MAY 13 1946
CHARLES ELMORE CROPL
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 1223

HOMER L. LOOMIS,

Petitioner,

against

UNITED STATES OF AMERICA,

and

LEO T. CROWLEY, Alien Property Custodian of the United States,

Respondents.

PETITION FOR WRIT OF CERTIORARI AND SUPPORTING BRIEF

HOMER L. LOOMIS,
Pro se,
60 Wall Street,
New York City, New York.

APPEAL PRINTING CO., INC., 129 CEDAR ST., NEW YORK, WO 2-2341

TABLE OF CONTENTS

PAGE

Petition for Writ of Certiorari 1

A. Summary Statement of Matter Involved..... 1–9

B. Jurisdictional Statement 9–10

C. The Questions Presented 10–12

D. Specifications of Error 12–23

E. Reasons Relied on for the Allowance of the Writ 23–28

Brief in Support of Petition:

A. Introductory Statements 31–32

1. Report of Opinions Below 31

2. Basis of Jurisdiction 32

3. Specifications of Error 32

B. Argument 32–71

Summary of Argument 32–37

First Point—The decree affirmed by the Circuit Court in denying Petitioner a defense of his equitable title in and to the Fund in the registry of the District Court denied him the due process to which he was entitled under the Constitution 37–52

a. Petitioner's claim stated a perfect cause of right to the fund and exercise of the District Court's jurisdiction 37–40

b. The lower Courts' refusal to permit Petitioner to defend in court his asserted property right when there assailed, constituted an arbitrary and capricious denial of due process 41–52

PAGE

SECOND POINT—The Circuit Court of Appeals erred in holding that it was without jurisdiction to hear Petitioner's appeal 52–71

a. The admiralty *in rem* jurisdiction of a United States District Court survives the loss of its *res* where the latter is removed improvidently or in violation of law 54–57

b. The equity jurisdiction of a United States District Court administering in admiralty a remnant and surplus survives its loss 57–60

c. Sovereign immunity presents no obstacle to the exercise of the jurisdiction of a United States Court, either admiralty *in rem* or equity, to which the sovereign has voluntarily submitted.... 60–67

d. The stay of a supersedeas was unnecessary to keep alive the District Court's jurisdiction..... 67–71

Conclusion—The petition for a writ of certiorari should be granted to the end that the proceedings had below may here be reviewed and the decree there entered reversed 72

Table of Cases

Adeline, The, 9 Cranch 248 ..... 37, 71
Ager v. *Murray,* 105 U. S. 126 ..... 58, 59
Albert Schultz, The, 12 Fed. 156 ..... 33, 40
Andrews v. *Wall,* 3 How. 568 ..... 33, 40
Athol, The, 1 Wm. Rob. 374 65
Atlantic City, The, 220 Fed. 281 40
Ayers, In re, 123 U. S. 123 66

Barnes v. *Alexander,* 232 U. S. 117 ..... 32, 39
Brennero, The, (C.C.A.), 153 F. 2d 138 ..... 6, 31
(D.C.) 58 F. Supp. ~~927~~ 447 ..... 6, 31
Brown v. *United States,* 8 Cranch 110 ..... 25, 51

PAGE

Chicot County v. *Sherwood*, 148 U. S. 529 49
City of Norwich, The, 118 U. S. 468 58
Cohens v. *Virginia*, 6 Wheat. 264 ..... 25, 49
Colonna, Ex parte, 314 U. S. 510 2
Columbian Government v. *Rothschild*, 1 Sim. 94 65
Corbett v. *Nutt*, 10 Wall. 464 58
Crow Dog, Ex parte, 109 U. S. 556 50

Duchese, The, Swabey 264 57
Du Pont de Nemours & Co. v. *Vance*, 19 How. 162 ..... 37, 71

Eclipse, The, 135 U. S. 599 40
Edith, The, 94 U. S. 518 ..... 33, 40

Finley v. *Lynn*, 6 Cranch 238 ..... 37, 71
Flora, The, Law Rep. 1 Adm. 45 57
Flying Fish, The, 2 Cranch 170 66

Gazelle and Cargo, The, 184 U. S. 474 ..... 37, 71
Goldthwaite v. *Day*, 149 Mass. 185 65
Graham & Foster v. *Goodsell*, 282 U. S. 409 50
Guiding Star, The, 18 Fed. 263 ..... 33, 38, 57

Hartford Accident Co. v. *Southern Pacific*, 273 U. S. 207 ..... 25, 38, 40, 58
Heckers v. *Fowler*, 2 Wall. 123 68
Hero, The, Brown & Lush. 447 57
His Majesty's Government, etc., v. *Compagnie, G. T.*, 40 F. Supp. 650 40
Hovey v. *Elliott*, 167 U. S. 409 ..... 14, 15, 25, 32, 34, 36, 41
Hunter v. *Central Union Trust Co.*, 17 F. 2d 174 ..... 14, 34, 50
Hurtado v. *California*, 110 U. S. 516 41

I. F. Chapman, The, 241 Fed. 836 ..... 23, 36, 57
Ingersoll v. *Coram*, 211 U. S. 335 ..... 13, 32, 39
Irrigation Company v. *Gildersleeve*, 174 U. S. 603 ..... 25, 68
Isenberg v. *Trent Trust Co.*, 26 F. 2d 609, cert. den. 279 U. S. 862 ..... 15, 16, 25, 34, 44, 45, 46, 50

J. E. Rumbell, The, 148 U. S. 1 ..... 13, 33, 40
John Jay, The, 17 How. 399 40
Just v. *Chambers*, 312 U. S. 383 ..... 25, 38

PAGE

Ketchum v. *St. Louis,* 101 U. S. 306 ..... 32, 39

Legard v. *Hodges,* 1 Ves. Jr. 478 39
Lewis v. *Darling,* 16 How. 1 58
Liverpool Steam Co. v. *Phenix Ins. Co.,* 129 U. S. 397 ..... 37, 71
Livingston v. *The Jewess,* 1 Ben. 19n., 15 Fed. Cas. 665, Case No. 8412 57
Lottawanna, The, 20 Wall. 201 ..... 32, 33, 37, 38, 40, 57, 59

Massie v. *Watts,* 6 Cranch 148 ..... 25, 58
McClellan v. *Carland,* 217 U. S. 268 49
McVeigh v. *United States,* 11 Wall. 259 ..... 14, 15, 25, 32, 34, 36, 41
Mechanics Bank v. *Seton,* 1 Pet. 299 59
Miller v. *Sherry,* 2 Wall. 249 59
Miller v. *United States,* 11 Wall. 268 51
Mitchell v. *Bunch,* 2 Paige (N. Y.) 606 59
Morf v. *Bingaman,* 298 U. S. 407 50
Muller v. *Dows,* 94 U. S. 444 58

Newbattle, The, 10 P. D. 33 66
Nuestra Señora de Regla, The, 108 U. S. 92 ..... 19, 25, 36, 37, 55, 56, 63, 64, 65, 66

Oliver v. *Piatt,* 3 How. 333 ..... 25, 59
Osborn v. *United States Bank* 16, 25, 66

Paquete Habana, The, 198 U. S. 453 66
Patten v. *Wilson,* 34 Pa. 299, 300 39
Penn v. *Lord Baltimore,* 1 Ves. 444 59
Pennell v. *Deffell,* 4 De Gex, M. & G. 372 59
Perry v. *United States,* 294 U. S. 330 25
Phebe, The, 1 Ware [354] 360, 19 Fed. Cas. 424, Case No. 11,065 ..... 41, 42
Phelps v. *McDonald,* 99 U. S. 298 ..... 25, 58
Philadelphia Co. v. *Stimson,* 223 U. S. 605 ..... 25, 66
Providence Steamship Co. v. *Hill Manufacturing Co.,* 109 U. S. 578 ..... 40, 58

Rio Grande, The, 23 Wall. 458 ..... 16, 18, 25, 36, 54, 70
Rodgers v. *United States,* 185 U. S. 83 50

PAGE

Schuchardt v. *Ship Angelique*, 19 How. 239 .....13, 33, 40, 41
Second Employers' Liability Cases, 223 U. S. 1 49
Siren, The, 7 Wall. 152 .....19, 25, 36, 61, 62, 63, 64, 65
St. Lawrence, The, 66 U. S. 522 49
Stoehr v. *Wallace*, 255 U. S. 239 .....14, 25, 34, 50, 51
Suydam v. *Broadnax*, 14 Pet. 67 49

Terney v. *Wilson*, 45 N. J. L. 282 39
Tervaete, The, [1922] P. 259 66
Thekla, The, 266 U. S. 328 .....19, 25, 37, 65
Three Friends, The, 166 U. S. 1 .....23, 25, 36, 56, 57, 71
Truax v. *Corrigan*, 257 U. S. 312 .....14, 15, 25, 32, 34, 36, 41, 42

Union, The, 4 Blatchf. 90 57
Union Bank v. *Jolly's Administrators*, 18 How. 503 49
Union Pacific Railway Co. v. *McAlpine*, 129 U. S. 305.... 59
United States v. *Ames*, 99 U. S. 35 .....22, 25, 36, 57, 71
United States v. *Dunn*, 268 U. S. 121 .....25, 59, 60
United States v. *422 Casks of Wine*, 1 Pet. 547 32
United States v. *Lee*, 106 U. S. 196 66
United States v. *Mackoy*, 2 Dill. 299, 26 Fed. Cas. 1,123, Case No. 15,696 57

Virgo, The, 13 Blatchf. 255 57

Walker v. *Brown*, 165 U. S. 654 .....13, 32, 39
Washington v. *Miller*, 235 U. S. 422 50
Watts, Watts & Co. v. *Unione Austriaca di Navigazione*, 248 U. S. 9 .....14, 15
Weil v. *Neary*, 278 U. S. 160 .....18, 25, 36, 68
Western Maid, The, 257 U. S. 419 65
Williams v. *Ingersoll*, 89 N. Y. 508 39
Wilson v. *Seeber*, 72 N. J. Eq. 523 39
Windsor v. *McVeigh*, 93 U. S. 274 .....14, 15, 25, 32, 34, 36, 41

Young, Ex parte, 209 U. S. 123 66

Table of Laws

PAGE

Constitutional:
Fifth Amendment 13, 16, 17, 24, 32, 34, 36, 41

Congressional:
Statutes:
Idle Foreign Vessels Act, June 6, 1941 (55 Stat. 242; 50 U. S. C. A., App., sec. 1271) 11

Judicial Code, sec. 240 (Act of March 27, 1911, c. 23, sec. 240, 36 Stat. 1157, as amended by the Act of Feb. 13, 1925, c. 229, sec. 1 [43 Stat. 938], 28 U. S. C. A., sec. 347) 9–10

Revised:
Sec. 918 (28 U. S. C. A., sec. 731) 67, 68

1007, as amended by the Act of Feb. 18, 1925, c. 80, sec. 1, 18 Stat. 318 (28 U. S. C. A., sec. 874) 7, 17, 21, 27, 35, 36, 54, 67, 68

1012, as affected by the Act of Mar. 3, 1911, c. 231, sec. 291, 36 Stat. 1167 (28 U. S. C. A., sec. 880) 7, 17, 21, 27, 35, 36, 54, 67, 68

Trading with the Enemy Act, Oct. 6, 1917, c. 106 (40 Stat. 411; 50 U. S. C. A., App.) 6, 11, 51

Sec. 5(b) 14
7(a) 26
7(c) 6, 14, 33
7(d) 16, 17, 26, 34, 48, 49
7(e) 17, 34, 48, 49
9(a) 6, 33, 43

Executive:
Alien Property Custodian's Vesting, No. 52 (7 F. R. 5738) 3, 4, 43, 44, 45, 46, 47

Executive (No. 9095) 7 F. R. 1971, as amended by Exec. (No. 9193) 7 F. R. 5205 14
Sec. 2(f) 51
10(a) 14

PAGE

Executive (No. 9193) 7 F. R. 5205 ..... 14, 51

Judicial:

U. S. Adm. Rules:

41 ..... 7, 67

42 ..... 2, 32, 38

44 68

U. S. Dist. Ct. (D. N. J.) Adm. Rule 28 ..... 8, 17, 21, 35, 36, 67, 68

Table of Commentaries

Pomeroy's Equity Jurisprudence [5th ed., 1941], Vol. 4, sec. 1235, p. 696 ..... 13, 39

Story's Equity Jurisprudence, Vol. II,

Sec. 899 58

Sec. 1231, pp. 316-317 39

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. .....

HOMER L. LOOMIS,
Petitioner,

against

UNITED STATES OF AMERICA

and

LEO T. CROWLEY,
Alien Property Custodian of the United States,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court:

The petition of Homer L. Loomis respectfully alleges and propounds as follows:

A

Summary Statement of Matter Involved

1

Your petitioner is a citizen of the United States, a resident of the State and City of New York, and a mem-

ber of the bar of this Honorable Court and each of the lower courts.

2

When the Italian vessel "Brennero" came into the custody of the United States District Court for the District of New Jersey in the admiralty proceedings that constitute in part the subject matter of the Petition filed in No. 1176, October Term, 1945, she had aboard a cargo of lubricating oil, to which a claim was filed by Don Ascanio Colonna, Italian Ambassador to the United States, asserting such oil to be then owned by the Italian Government and claiming it as such (R. 19a).* By the Court's order (R. 17a), made at the instance and on the motion of the United States (13a-18a), that oil was subsequently sold (R. 3a), producing net proceeds of $151,599.45, which were ordered and were paid into the registry of the Court (R. 44a).

3

In connection with that disposition of the cargo, there had been much litigation in which your petitioner had performed substantial legal services for said claimant of said cargo, and on May 11, 1942, those particular services having been concluded in the meantime (*Ex parte Colonna*, 314 U. S. 510), your petitioner, pursuant to Rule 42 of the Admiralty Rules of this Court,† filed in the District Court a petition alleging, among other things (35a), that

> "by agreement between him and the owner of said cargo, it was stipulated that his services and dis-

* This and similar notations refer to pages of the printed transcript of record filed herein.

† This rule, as pertinent, reads:

> "Any person having an interest in any proceeds in the registry of the court shall have a right by petition and summary proceedings to intervene *pro interesse suo* for delivery thereof to him, and on due notice to the adverse parties, if any, the court shall and may proceed summarily to hear and decide thereon, and to decree therein according to law and justice * * *"

bursements should be chargeable 'as a lien' thereon, and should be recoverable therefrom'';

describing the nature and extent of those services and praying for an order fixing the just value thereof and directing payment of the same and of the said disbursements to your petitioner out of said fund as property charged therewith.

And on March 24, 1943, his petition not having been acted on in the meantime, and extensive legal services by your petitioner in respect to the vessels forming the subject matter of the petitions in Cases Nos. 1172 to 1179 respectively (Oct. T. '45), having in the meantime been completed either in whole or in measurable part, a further petition of the same nature was filed on March 24, 1943, seeking enforcement of said lien against said fund for such other professional services, alleging them also to be within the protection of said lien, describing their nature and extent, and claiming that their just value exceeded the total amount of said fund (R. 81a), and praying, therefore, the entry of an order fixing the value of said services and directing the payment to your petitioner of the whole of said fund on account of said services and the disbursements by him incurred in connection therewith (R. 81a). These petitions are hereinafter referred to as petitioner's claim or petition.

4

In the meantime, to-wit, on July 22, 1942, (R. 54a), respondent Leo T. Crowley, the then Alien Property Custodian, by Vesting Order No. 52 (R. 52a), purported to capture for enemy ownership *not* the *fund itself*, but the *interest therein, if any*, of Societa Anonima Cooperativa di Navigazione Garibaldi, the Italian Government and the Italian Navy (52a, 53a, 54a, 57a). And on March 17,

1943, (R. 47a), said Custodian filed in said Court his petition praying for an order directing payment to him of the said fund, on the ground that other than the proctors for the cargo, no person had made any claim to the fund (R. 49a) and that the claim of proctors was unsustainable because their services had not "in any manner *benefited* the *res*" (R. 49a), that they were at best, therefore, but general "creditors of the Royal Italian Government *whose* title he" (the Custodian) "has acquired by such Vesting Order" (R. 50a) and that they, therefore, "should be remitted to administrative proceedings before" the Custodian (R. 50a).

5

On March 29, 1943, (R. 82a), the Royal Italian Government, as owner of said cargo, and Societa Anonima Cooperativa di Navigazione Garibaldi, as bailee thereof, filed their answer to the Alien Property Custodian's petition, denying *inter alia* the right of the Alien Property Custodian to the proceeds resulting from the said sale of said cargo (R. 50a, 83a) and affirmatively alleging and propounding that

> "not only does the petition fail to establish in the Alien Property Custodian any right to the possession or control of the said deposit, but by the express provisions of the law and Executive Orders made pursuant thereto, the Alien Property Custodian is prohibited from acquiring custody and possession of the said deposit, or exercising control thereover" (R. 83a);

and praying the entry of an order dismissing the Custodian's said petition.

Also on March 29, 1943, (R. 85a), your petitioner filed an answer to the Custodian's said petition, in which

answer your petitioner *inter alia* repeated in substance the said allegations of his said petition, denied the right of the Alien Property Custodian to possession or control of the said proceeds, asserted that he was, on the contrary, by the express provisions of the law prohibited from acquiring the same, and prayed the entry of an order denying and dismissing the Custodian's said petition and directing that said fund

> "be retained in the possession and custody and control of this" (the District) "Court to satisfy the claims of the said intervening petitions for the payment of counsel fees and the reimbursement of legal expenses, as aforesaid" (R. 87a).

6

On March 29, 1943 (R. 6a), the Custodian's said petition came on for hearing in said District Court before Hon. William F. Smith, District Judge, but without the production of any proof in support thereof and without any opportunity's being accorded the parties answering it as aforesaid to make good their defense thereto with proof or otherwise, and was orally argued with provision made for the filing of briefs. Decision was reserved. Your petitioner's claim though duly noticed for hearing at the same time (R. 65a) was left unheard (R. 6a, 94a).

7

On January 19, 1944, (R. 90a), the said Court filed its opinion, granting, without a trial, the prayer of the Custodian for possession of the fund—but on grounds by him never voiced and inconsistent with those he had asserted—and dismissing, without a trial, the claim of your petitioner (R. 93a). The basis of the Court's opinion was (R. 93a) that

> "The Custodian, upon seizure of *the proceeds of the cargo,* acquired absolute title to *the fund* on deposit in the registry of the court * * * and a right to *its* immediate possession" (Emphasis added);

that the court was, therefore, "without jurisdiction to entertain" your petitioner's demands; that they were "in substance suits against the United States"; that they might, therefore, be maintained "only with the consent of the sovereign"; and that such consent had not been given to the making of such demands against it in court save in the method "provided by Section 9(a) of the Trading with the Enemy Act" (Act of October 6, 1917, c. 106, sec. 9[a]; 40 Stat. 411; 50 U. S. C. A., App., sec. 9[a]) and made exclusive by sec. 7(c) of the same Act* (R. 93a).

---

* Section 7(c), as pertinent, provides:

> "If the President shall so require any money or other property * * * owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy * * * not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, * * * may be seized by the Alien Property Custodian; * * *
>
> * * * * * *
>
> "The sole relief and remedy of any person having any claim to any money or property * * * seized by him shall be that provided by the terms of this Act."

Section 9(a), as pertinent, reads:

> "Any person not an enemy or ally of enemy claiming any interest, right, or title, in any * * * property * * * seized by him" (the Alien Property Custodian) "hereunder and held by him * * * or to whom any debt may be owing from an enemy * * * whose property or any part thereof shall have been * * * seized by him hereunder * * * may file with the said custodian a notice of his claim * * * and * * * may institute a suit in equity in the Supreme Court of the District of Columbia or in the District Court of the United States for the district in which such claimant resides * * * to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, * * * or delivery to said claimant of the money or other property so held by the Alien Property Custodian * * * or the interest therein to which the court shall determine said claimant is entitled."

8

On January 20, 1944 (R. 94a), the District Court entered on said opinion its decree which, though not adjudicating expressly with respect to your petitioner's claim, did, in effect, deny or dismiss it, by directing the Clerk to pay over to the Custodian "the proceeds of the sale of said cargo" (R. 94a).

9

On Monday, January 24, 1944 (R. 7a), that is, three days after the filing of said decree, Sunday excluded, the Judge and Clerk of the District Court executed the said order by forwarding the said proceeds* of sale to the Custodian; although by R. S. sec. 1007, as amended by the Act of February 18, 1925, c. 80, sec. 1, 18 Stat. 318, (28 U. S. C. A., sec. 874),† and R. S. sec. 1012, as affected by the Act of March 3, 1911, c. 231, sec. 291, 36 Stat. 1167, (28 U. S. C. A., sec. 880)‡ it was *unlawful to execute the decree until ten days, Sundays excluded, after its entry—*

---

* They were paid by a check which under Rule 41 of the Admiralty Rules of the United States had to be signed by the Judge and countersigned by the Clerk. That Rule reads:

"All moneys paid into the registry of the Court shall be deposited in some bank designated by the Court, and shall be so deposited in the name of the Court, and shall not be drawn out, except by a check or checks *signed by a judge of the Court* and countersigned by the Clerk, stating in whose account and for whose use it is drawn, and in what suit and out of what fund it is paid. The Clerk shall keep a regular book, containing a memorandum and copy of all of the checks so drawn and the date thereof." (Emphasis added.)

† R. S. §1007, as amended by the Act of Feb. 18, 1875, c. 80, §1, 18 Stat. 318, (28 U. S. C. A. §874), and as pertinent, reads as follows:

"In any case where a writ of error may be a supersedeas, * * * Sundays exclusive, * * * executions shall not issue until the expiration of ten days."

‡ R. S. §1012, as affected by the Act of March 3, 1911, c. 231, §291, 36 Stat. 1167, (28 U. S. C. A., sec. 880), and as pertinent, reads:

"Appeals from district courts shall be subject to the same rules, regulations, and restrictions as * * * prescribed in law in cases of writs of error."

that is, until Tuesday, February 1, 1944,—and by Rule 28 of the Admiralty Rules of said court,* a certified copy of which is here exhibited the execution of the decree was *automatically stayed* until a time *ten* days following *service upon petitioner of a copy of said decree with notice of filing.*

10

Neither does the record show, nor has it ever been claimed, nor is it the fact that any copy of said decree, with notice of filing, has ever to this day been served upon petitioner to start the running of the last ten days of the stay provided by said Rule 28 of the District Court's Admiralty Rules.

11

Pursuant to leave obtained on April 20, 1944 (R. 97a), your petitioner appealed to the Circuit Court of Appeals for the Third Circuit from the said decree and the rulings announced in said opinion whereon the decree was based,

---

* "United States of America, District of New Jersey.

"I, William H. Tallyn, Clerk of the District Court of the United States for the District of New Jersey, do hereby certify that Rule 28 of the Admiralty Rules of this Court, to wit:

> 'In appealable cases ten days from the time of service of a copy of the decree on the opposite proctor, with notice of its entry, shall be allowed to enter an appeal, within which time the decree shall not be executed. The security for damages and costs described in Rule 13 of the Circuit Court of Appeals shall be given within ten days after the filing of the notice of appeal, or execution may issue as of course to enforce the decree of this Court, unless otherwise ordered by the Court.'

was adopted by this Court on May 1, 1938.

"I further certify that there is no order of this Court on file directly repealing this Rule.

"IN TESTIMONY WHEREOF, I have hereto subscribed my name and affixed the seal of said Court, at Newark, in said District, this 25th day of March, A.D. nineteen hundred and forty-six.

William H. Tallyn, Clerk.
by Minnie M. Spalletta,
Deputy Clerk."

(Seal)

and assigned as error *inter alia* the Court's so delivering the *res* and failing to retain it in its possession as so required (102a).

12

On March 30, 1945, the appeal came on to be heard in the said Circuit Court of Appeals, which on December 13, 1945, filed its opinion of affirmance and on December 21, 1945, its order based thereon. The reasoning on which the Circuit Court reached that result was in substance that the Custodian had by virtue of his vesting order captured "title to the oil". But the Court also ruled that, despite such capture, petitioner was, if possessed of a valid lien, still entitled to assert the same against the fund in the District Court; that the decree of the District Court directing delivery of the fund to the Custodian was, however, "a lawful court order"; and that, since petitioner did not lodge his appeal and move for a stay before the fund was so delivered, the District Court had lost all jurisdiction further to hear his petition and the Circuit Court all jurisdiction to hear his appeal (R.).

On December 28, 1945, your petitioner filed his petition for a reargument of his appeal (R.), which, without opinion, was denied by order filed on February 13, 1946.

B

Jurisdictional Statement

1

The statutory provision sustaining the jurisdiction here invoked is section 240 of the Judicial Code as amended (Act of March 3, 1911, c. 23, sec. 240, 36 Stat. 1157, as

amended by the Act of February 13, 1925, c. 229, sec. 1, 43 Stat. 938; 28 U. S. C. A., sec. 347).*

2

The date of the decree sought to be reviewed is December 21, 1945 (R.), as to which a timely petition for reargument was denied by an order filed February 13, 1946 (R.); the date upon which this application for certiorari is presented is May /3 , 1946.

C

The Questions Presented

1

Whether an alien enemy whose cargo property has been brought into the custody and control of a United States District Court under admiralty process *in rem* issued against the carrying vessel at the instance of the Federal Government and has been sold by said court at the instance of that Government producing proceeds which are deposited in the registry of said court, and whose property in said proceeds has there been assailed by the Federal Government on the ground of having a captor's title thereto by reason of capture for enemy ownership, and who appears in said court and undertakes to defend the *res*, may by judicial decree be deprived thereof unheard and without a trial.

---

* Section 240 of the Judicial Code, as amended and pertinent, reads as follows:

> "In any case, civil or criminal, in a circuit court of appeals * * * it shall be competent for the Supreme Court of the United States upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower Court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal."

2

Whether under the same circumstances described in Question 1, *supra,* an American citizen whose property in the said proceeds has been assailed by the Federal Government as wholly non-existent either prior to or at the time of the said alleged capture of said alien enemy's interest in said proceeds and who appears in said court and undertakes to defend his property in the *res,* may by judicial decree be deprived thereof unheard and without a trial.

3

Whether the said alien enemy's property in said cargo proceeds—in a case where the circumstances disclosed in Questions 1 and 2 *supra* are present and where the said vessel's use and possession, under the Idle Foreign Vessels Act, has been requisitioned, availed of and operated as chartered by the Federal Government and her said cargo's proceeds realized and deposited as aforesaid while the said vessel's and said cargo's owner is still an alien friend,—becomes, while the said proceeds are still so deposited in the Court's registry, and while the vessel is still so possessed and operated by the Federal Government, subject to capture under the Trading with the Enemy Act on that Government's going to war with that of the said vessel and said cargo owner.

4

Whether in the circumstances disclosed in Questions 1, 2 and 3 *supra,* a vesting order made by the Alien Property Custodian of the United States, wherein he purports to vest in himself such "right, title and interest, if any," as the said alien enemy may then have in said proceeds, but disclaims all knowledge, and makes no finding, as to whether the latter in fact has any such interest therein, vests him with title to the said proceeds and precludes

or excuses the said District Court from further exercise of its jurisdiction over said proceeds to the end of conserving the same, ascertaining their true owners and distributing them thereto.

5

Whether the appropriate Circuit Court of Appeals—on a timely appeal from a decree of said District Court upholding the affirmative of Questions 1, 2, 3 and 4 *supra,* and ordering without a trial of the merits delivery of said proceeds to the Alien Property Custodian as agent of and captor for the Federal Government—is (while said principal cause against said vessel still remains undisposed of) deprived of its jurisdiction and relieved of its duty to hear and decide said questions and reverse said decree because the Judge and Clerk of said District Court have physically delivered said cargo proceeds to the said Custodian in violation of a Federal law before the expiration of a stay (provided by said law) of ten days from the day of entry of said decree, and in violation of a rule of their own court before the expiration of a stay (provided by said rule) of ten days from the day of service of a copy of said decree with notice of filing on the opposite proctor, such service never having been effected either prior or subsequent to the lodging of such appeal, and no stay in addition to those so provided ever having been applied for by the said appellant.

D

Specifications of Error

Error is assigned to the decree and rulings of the Circuit Court of Appeals as follows:

1. In that they sanctioned the District Court's arbitrarily denying to petitioner and Italian Claimants the right

to defend as their own in court property there assailed and, without a trial, arbitrarily surrendering that property to another.

It is your petitioner's position that his petition, his answer to the Alien Property Custodian's petition and the answer thereto of the Royal Italian Government and Societa Anonima Cooperativa di Navigazione Garibaldi alleged a valid defense to Custodian's said petition (*Schuchardt* v. *Ship Angelique,* 19 How. 239, 241; *The J. E. Rumbell,* 148 U. S. 1, 15; *Ingersoll* v. *Coram,* 211 U. S. 335; *Walker* v. *Brown,* 165 U. S. 654; *Barnes* v. *Alexander,* 232 U. S. 117, 120, 121; Pomeroy's Equity Jurisprudence [5th ed., 1941], Vol. 4, sec. 1235, p. 696); and that it was an arbitrary denial of due process for the District Court to surrender the proceeds of the "Brennero's" cargo to the Custodian, deny petitioner and the other said parties their asserted right to defend in court their property as there assailed by the Custodian, and dismiss their pleadings and defense unheard, while the merits thereof and of the Custodian's assailing claim remained untried (Const., 5th Am'd't.)*

The basis for the District Court's decision, petitioner urged and urges, was on its face untenable. That basis was the proposition that the Custodian had, by virtue of his vesting order, "acquired absolute title to the fund" (R. 93a). The face of the record shows that cannot be true for at least six reasons:

First: The fund was a *res* in court where title was then in course of being judicially tried; as to which therefore, the Custodian possessed no right of capture by predetermining title in himself.

Second: The fund was a trust fund analogous to a fund held by a District Court in limitation of liability proceed-

* "No person shall be deprived of * * * property without due process of law; * * *."

ings, and being administered by that District Court as a court of equity, and no claimant was entitled to a decree of title thereto without his first *establishing* his right in proceedings wherein his adversaries had full and fair opportunity to be heard and to disprove it. (*McVeigh* v. *United States,* 11 Wall. 259, 267; *Windsor* v. *McVeigh,* 93 U. S. 274, 277; *Hovey* v. *Elliott,* 167 U. S. 409, 414; *Watts, Watts & Co.* v. *Unione Austriaca di Navigazione,* 248 U. S. 9, 22; *Truax* v. *Corrigan,* 257 U. S. 312, 332.)

THIRD: The vesting order itself showed that the Custodian had made no predetermination of title in himself, as successor in interest to an enemy owner, and therefore could not exercise the power of capture nor assume the status of captor. (Trading with the Enemy Act, sec. 7[c], *supra,* 6n.; Executive Order No. 9095 [7 F. R. 1971] as amended by Executive Order No. 9193 [7 F. R. 5205], sec. 10[a]*; *Stoehr* v. *Wallace,* 255 U. S. 239, 244-245; *Hunter* v. *Central Union Trust Co.* [D.C. S.D. N.Y.], 17 F. 2d 174, 175, 178).

FOURTH: His petition showed on its face that he came into court not in the capacity of captor but in that of

---

* This reads:

"10. * * * (a) * * * For the purpose of this Executive Order any *determination* by the Alien Property Custodian that any property or interest of any foreign country or national thereof *is* the property or interest of a designated enemy country or national thereof shall be *final and conclusive as to the power* of the Alien Property Custodian *to exercise any* of the power or authority conferred upon me by section 5(b)† of the Trading with the Enemy Act, as amended." (Emphasis supplied.)

† Section 5(b) as pertinent, reads:

"(1) During the time of war or during any other period of national emergency declared by the President, * * * any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States * * *."

suitor; and called on the court *to exercise, not abandon to him,* its function of adjudicating title to the *res* (R. 49a-53a).

FIFTH: The vesting order, itself showed that his *utmost claim* to title, was not to title of the *res* itself but only to such "right, title and interest, if any," therein as might be possessed at the time of the vesting order by three named alien enemies; and so, until the *Court* had by trial determined that the exclusive right thereto *was* in them and none in your petitioner, it had no color of right for assuming *all* right to be in the Custodian as their successor in interest, and *none* in your petitioner. (*Isenberg* v. *Trent Trust Co.* [C.C.A. 9th Cir.], 26 F. 2d 609, 613, cert. den. 279 U. S. 862).

SIXTH: As proceeds of the cargo still aboard the "Brennero" when the latter was requisitioned, the fund in the District Court's registry shared the vessel's immunity to capture (Brief of Petitioner in *The Antoinetta,* No. 1172 here, October Term, 1945).

2. In that they pronounced the decree of the District Court denying petitioner the right to be heard in defense of his property and ordering its surrender to another, a "lawful court order."

The basis of this assignment is that since the decree of the District Court plainly violated the command of the Fifth Amendment that none shall be deprived of his property without due process of law,—which must include the right to defend it in Court when there assailed,—it could not have been a lawful order (*McVeigh* v. *United States, supra; Windsor* v. *McVeigh, supra; Hovey* v. *Elliott, supra; Watts, Watts & Co.* v. *Unione Austriaca di Navigazione, supra; Truax* v. *Corrigan, supra*).

3. In that they ruled that the Custodian's seizure "vested title to the oil in the Custodian" (R.).

It is petitioner's position that that ruling, like that of the District Court to the same effect, is without color of right because it was not in the power of the Custodian to capture a title in course of being adjudicated in court (cases last *supra*); because a capture of named enemies' "right, title and interest, if any," in a *res*, is not a capture of title to the *res* (*Isenberg* v. *Trent Trust Co., supra*, 613); and because that ruling is contradicted by the express terms of the vesting order itself and undertakes to force on the Custodian a title he himself had refused to assume (R. 54a).

4. In that they ruled that the decree directing payment of the fund to the Custodian was "an order which the court had the power to make."

It is petitioner's contention that the District Court had no judicial power whatever to enter a decree disposing of his property to another until after a trial of the merits; that "judicial power, as contradistinguished from the power of the laws, has no existence" (*Osborn* v. *United States Bank*, 9 Wheat. 738, 866); and that, in violating the command of the Fifth Amendment, the court was exceeding its judicial power quite as much as a court that surrenders a *res* in violation of a *pendente lite* stay imposed by statute (*The Rio Grande*, 23 Wall. 458, 463, 465), the only difference being that the latter stay is temporary, that of the Fifth Amendment perpetual.

5. In that they in effect ruled and decreed that a United States District Court holding a fund in its registry in trust for those beneficially entitled thereto may—without a finding either by Custodian or by Court of the existence of an enemy interest therein,—abdicate its judicial jurisdiction and avoid its judicial duty, by availing itself of the privilege accorded private persons under subsec-

tions (d) and (e) of Section 7 of the Trading with the Enemy Act and turning such trust fund over to the Custodian.

The basis of this argument is that the District Court did, in effect, what individuals might do under said provisions of said statute, viz., deliver property in their possession to the Custodian though he had not captured it, and thereby relieve themselves of liability to *enemy* owners if any such there be; that the Court of Appeals in its decree of affirmance, in effect, approved of what the District Court had thus done; and that, in so doing, the Court of Appeals erred for at least three reasons, viz.: (1) Because the District Court was not a person entitled to the benefit of subsections (d) and (e) of Section 7 of the Trading with the Enemy Act; (2) because its judicial duties forbade its availing itself of such benefit; and (3) because just as a person, while in course of being proceeded against in court by a citizen suitor for the recovery of such property or its value as his own, could not escape his asserted liability therefor by delivering it to the Custodian as enemy property, the District Court could not evade *its* duty of adjudication owed to the *citizen* suitor under the like circumstances.

6. In that they determined the removal of the fund from the registry of the District Court by its Judge and Clerk to have been with color of right.

The basis of this assignment is that, in addition to the court's violation of the Fifth Amendment in entering its decree, its Judge and Clerk violated the *pendente lite* stay imposed by R. S. secs. 1007 and 1012 (*supra*, 7n.) and the 28th Admiralty Rule of their own court (*supra*, 8n.). Those statutes automatically prohibited payment of the fund in execution of the decree until ten days, excluding Sundays, after its entry; and the rule, until ten

days from and after the day of service of a copy of the decree with notice of filing upon the opposite proctor. That law and that rule the Judge and Clerk made no pretense of obeying. Instead, they executed the order on the *third* day after its entry, Sunday excluded: It was entered on Thursday, January 20th, 1944 (R. 7a); they executed it on Monday, January 24th, 1944 (R. 7a). That rule, as well as those statutes, had the force of law (*Weil* v. *Neary*, 278 U. S. 160, 169-170). And it was and is petitioner's position that the Judge and Clerk here had no more color of right for violating that *pendente lite* stay so imposed by law than had the court for violating the same kind of a stay in *The Rio Grande, supra:* The removal of the *res* in violation of the stay in that case was pronounced "illegal" (463); it could have been no less so here.

7. In that they permitted the Custodian to urge the Circuit Court's want of power to act for want of the *res* he himself had wrongfully obtained and he or his principal wrongfully withheld.

The basis of this assignment is that the Circuit Court could not properly hear the *Custodian* complain of the absence of the *res* since it was he that wrongfully had removed it from the District Court and he or his principal that wrongfully withheld it. He and his principal were equally estopped from seeking advantage from its absence. To permit them to gain such advantage was to permit them to profit from their own wrong.

8. In that they erred insofar as they may be deemed to have ruled and decreed that the lower Courts were without jurisdiction to enter a decree against the United States—if it in the meantime may be presumed to have acquired possession of the trust fund,—adjudicating its

liability to pay the amount thereof to petitioner on the determination of his right, if any, in and to said trust fund.

The basis of this assignment is that the United States was a party to the litigation, had itself commenced it, was itself maintaining it, had itself induced the District Court to sell the cargo and deposit the proceeds in its registry, and by its Custodian was there claiming it in Court, and therefore, in respect to that litigation and those proceeds, had waived its sovereign immunity to suit and consented to the adjudication of its liability to the end that full justice should be determined and decreed by the Court in respect thereto (*The Siren*, 7 Wall. 152, 154, 159; *The Nuestra Señora de Regla*, 108 U. S. 92, 101, 102, 103; *The Thekla*, 266 U. S. 328, 340, 341).

9. In that they in effect sanctioned a breach of trust committed by the District Judge and his Clerk in paying away, contrary to law, a trust fund in their charge.

Petitioner urged and urges that in respect to the cargo proceeds the District Court sat as a court of conscience; that it held those proceeds in trust; that their surrender was a breach of that trust; and that it was the first duty of the Circuit Court to undo the wrong inflicted by the District Judge and his Clerk upon petitioner as one claiming to own the sole beneficial interest in the fund; that as to that fund the Circuit Court, like the District Court, sat as a court of equity and conscience; that their decrees ran *in personam*, as well as *in rem*, and were adequate to the correction of unconscionable wrong, at least where still before those Courts were the parties that were chargeable with that wrong; and that it is unconscionable that a wrong of the kind here practised should be permitted to endure.

10. In that they ruled and decreed in effect that the Circuit Court of Appeals was powerless to review and correct the diversion of the trust fund to the Custodian.

It was and is petitioner's contention that the Circuit Court of Appeals is not so powerless that it cannot correct injustice done in the District Court when that injustice is so great as entirely to dispossess the court of a trust fund it has had in its possession. That, if the Court be potent to correct the lesser injustice, viz., a partial depletion of a trust fund, some remnant of which still persists in the District Court's custody, it must be all the more possessed of power, in any enlightened system of justice, to correct the greater wrong involved in the complete dissipation, diversion and disappearance of such a fund. That its claim of impotence to correct the wrong is all the less sustainable here because it still had before it, as a party to the principal cause concerning the vessel *res*, as well as to the incidental cause concerning the proceeds of her cargo, the Custodian, who had received the trust fund with knowledge of the breach of law and trust involved, who, therefore, held it impressed with its original trust, and who, as such party, is and must be, whether he subsequently disposed of the trust fund or not, thoroughly amenable to the Court's jurisdiction to see justice done. That the Court also had before it as a party in like manner and like measure the Custodian's principal, the United States, whose liability to the extent it may be deemed to have received the trust fund is commensurate with that of the Custodian and for the like reasons. That, sitting as Courts of Equity in respect to the cargo proceeds, the lower courts' process was issuable *in personan* so that even though the *res* had gone, they were still able to compel the party or parties that had received it and that were still before them, to repay it; and that, too,

regardless of the fact that such parties may in the meantime have removed *it* beyond the Courts' jurisdiction.

11. In that they ruled and decreed in effect that petitioner's failure to move for a third stay *pendente lite* in addition to the first provided by R. S. secs. 1007 and 1012 (*supra,* 7n.) and the second provided by the District Court's 28th Admiralty Rule (*supra,* 8n.) destroyed those stays, legalized the previous unlawful disbursement of the fund, and destroyed the jurisdiction of the courts over the *res* and controversy.

It was and is petitioner's claim that already having the benefit of two perfectly good *pendente lite* stays imposed by law, to say nothing of the permanent stay provided by the Fifth Amendment, it was in no event incumbent upon him to seek another; at least unless and until steps were taken to dissolve the first by the return of the fund to the District Court so that that stay could resume the running of its course,—or to dissolve the second by service of a copy of the order with notice of filing. When and if those steps had been taken, petitioner would still have had seven days' time under the first stay, and ten under the second, in which to apply for a third. To apply for it before, would have been to seek what might never be needed:—What in fact never has been needed. For it is not denied that the fund never has been returned and, therefore, never has been subject to the first stay for more than three of the prescribed ten days; nor that a copy of the decree with notice of filing has never been served and, therefore, never has started the running of the last ten days of the second stay.

12. In that they failed to rule and decree that the District Court and Circuit Court of Appeals, while they still possessed plenary jurisdiction over the principal

cause, necessarily still possessed plenary jurisdiction over all its incidents, including the fund and the question of its beneficial ownership.

The basis of this assignment is the fact that the fund and the question of right thereto did not constitute the principal *res* and the principal cause before the District Court; that they were but incidents thereof; and that this case, therefore, even although it involved (as it does not) a lost *res*, is not subject to the same rule as would be applicable where the sole *res* has slipped from the Court's jurisdiction. The principal *res* here was *the vessel "Brennero"*; and the principal cause, the question of *its ownership*. The fund only *incidentally* came into court *with*, and *as a part of*, the vessel; and was so treated by the District Court (R. 92a), as well as by the Custodian, whose vesting order read (R. 53a):

> "In the case of the SS. Brennero the term 'vessel' includes also the proceeds of the cargo that was on board at the time the libel for forfeiture against the SS. Brennero was filed in the United States District Court for the District of New Jersey, which cargo has since been sold by order of said court."

The Circuit Court had no doubt that it had acquired jurisdiction over that principal *res* and that principal cause. But, if so, petitioner insisted below and insists here, it must have acquired jurisdiction at the same time over all its incidents, including the fund and the question of *its* ownership. For surrender of the incidental *res* to the Custodian had left the District Court in full possession of such jurisdiction as it had previously possessed over the principal *res* and cause; and, therefore, of jurisdiction to recall, or at least decree payment of the value of, the incidental *res* (*United States* v. *Ames*, 99 U. S. 35, 40-41,

42; *The Three Friends,* 166 U. S. 1, 68; *The I. F. Chapman* [C. C. A., 1st Cir.], 241 Fed. 836, 840). And, when the Circuit Court on appeal acquired the District Court's jurisdiction over the principal *res* and cause, it must also have acquired as an incident thereof that same court's jurisdiction to recall the incidental *res* or, at least, to decree the liability of any party that had received it to pay its value to petitioner if otherwise entitled thereto; and, if it did not, to enforce petitioner's claim against the principal *res* to the extent the former had any property therein (*Finley* v. *Lynn,* 6 Cranch 238, 252).

E

Reasons Relied on for the Allowance of the Writ

I. The Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings and so far sanctioned such a departure by the District Court, as to call for an exercise of this Court's power of supervision as follows:

It has, in its disposition of the five questions here presented (*supra,* 10-12), deprived, and sanctioned the District Court's depriving, petitioner of his property—while he was there engaged in defending the same against an adverse claim—without a hearing and in defiance of the applicable guaranties of due process.

It has, in its disposition of said questions, denied, and sanctioned the District Court's denying, petitioner the right of urging his claim of *beneficial title* to a fund held by the court in trust for its beneficial owners, and of urging in court—against a claim of captor's title there asserted by the United States to such "right, title and interest, if any," therein as was owned by certain named alien enemies,—the defense that such property, at the time of the alleged capture, was beneficially owned by him.

It has, in its disposition of said questions, denied petitioner, a citizen of the United States, the right of urging in court against said claim of captor's title there urged by the United States, the defense that there had never been such a capture, even of said alien enemies' interest, if any, in the *res,* because of the alleged captor's want of statutory and constitutional power to effect such a capture in any event, and because if he had such power, in any event, it was exercisable only after he had first found the existence in fact of an enemy interest in the *res,* and such he had not found.

It has, in its disposition of the fifth question, disclaimed all jurisdiction over and refused to hear petitioner's timely appeal from a decree of the District Court,—which without a trial dismissed his claim to the equitable ownership of a trust fund in its possession, and without a trial ordered its delivery to another in violation of the Fifth Amendment,—on the ground that surrender by the District Judge and Clerk of said trust fund to such other before appeal and in violation of stays provided by law and the rules of their own court, was a lawful execution of a lawful order and deprived both District and Circuit Courts of all further jurisdiction over the cause and over the trust *res.*

It has, in its disposition of the fifth question, though still exercising jurisdiction over the principal *res* and cause, to-wit, a vessel and the question of right thereto, yet has at the same time refused to exercise its purely incidental jurisdiction over the proceeds of her cargo and the question of right thereto on the ground that the unlawful delivery thereof pursuant to an unconstitutional decree precluded both District and Circuit Courts from any further exercise of that incidental jurisdiction.

II. The Circuit Court of Appeals' decision of the five federal questions here presented (*supra*, 10-12), conflicts with the applicable decisions of this Court, to-wit:

Its decision of the first and second, with *McVeigh* v. *United States*, 11 Wall. 259, *Windsor* v. *McVeigh*, 93 U. S. 274, 277, *Hovey* v. *Elliott*, 167 U. S. 409, 418, *Truax* v. *Corrigan*, 257 U. S. 312, 332, and cases to the same effect; and with *The Siren*, 7 Wall. 152, 154, 159, *The Nuestra Señora de Regla*, 108 U. S. 92, 101, 102, 103, *The Thekla*, 266 U. S. 328, 340, 341, and kindred cases.

Its decision of the third, with *Brown* v. *United States*, 8 Cranch 110, 126, and *Perry* v. *United States*, 294 U. S. 330, 352, 353, 354.

Its decision of the fourth, with *Stoehr* v. *Wallace*, 255 U. S. 239, 244-245; and with *Cohens* v. *Virginia*, 6 Wheat. 264, 404, and kindred cases.

Its decision of the fifth with *The Rio Grande*, 23 Wall. 458, 463, 465, and *The Nuestra Señora de Regla*, 108 U. S. 92, 101, 102, 103; with *Irrigation Company* v. *Gildersleeve*, 174 U. S. 603, 608, and *Weil* v. *Neary*, 278 U. S. 160, 169-170; with *United States* v. *Ames*, 99 U. S. 35, 40-41, and *The Three Friends*, 166 U. S. 1, 68; with *The Siren*, 7 Wall. 152, 154, 159, and *The Thekla*, 266 U. S. 328, 340, 341; and with *Massie* v. *Watts*, 6 Cranch 148, 158, 159, 160, *Oliver* v. *Piatt*, 3 How. 333, 401, *Osborn* v. *United States Bank*, 9 Wheat. 738, 838-839, 842-844, *Phelps* v. *McDonald*, 99 U. S. 298, 308, *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 619, 620, *United States* v. *Dunn*, 268 U. S. 121, 132, *Hartford Accident Co.* v. *Southern Pacific*, 273 U. S. 207, 215, 216-218, and *Just* v. *Chambers*, 312 U. S. 383, 386.

III. The decision of the Circuit Court of Appeals is in conflict with the decisions of other Circuit Courts of

Appeals as follows viz.: Its decision of the fourth question is in conflict with that of the Ninth Circuit Court of Appeals (*Isenberg* v. *Trent Trust Co.,* 26 F. 2d 609, 613, cert. den. 279 U. S. 862) holding that the vesting of an alien enemy's "right, title and interest", if any, in a *res* in the custody of a court hearing litigation over the question of its ownership, leaves the court possessed, as before, of full jurisdiction to retain the *res* in its custody and determine on proofs the ownership thereof.

IV. The Circuit Court of Appeals, in disposing of the fourth question, has decided a federal question that has never been, but should be, decided by this Court, viz.: Whether an order by the Alien Property Custodian of the United States, purporting to vest himself with the "right, title and interest, if any," of a specified alien enemy in a *res* in litigation and in *custodia legis,* if effective at all, deprives the court, in which such litigation pends, of jurisdiction to retain such *res* in its custody and control and determine what right, title and interest, if any, such alien enemy, as well as others, in fact have therein, or, on the contrary, leaves such jurisdiction unimpaired, at least until those respective interests have been so determined.

V. The Circuit Court of Appeals in disposing of the second, fourth and fifth questions, has decided a federal question that has never been, but should be, decided by this Court, viz.: Whether a United States District Court sitting in admiralty and holding a remnant and surplus in its registry in trust for its owners and having been presented with a citizen's claim therefor as beneficially owned by him, may escape its judicial and trustee duties by delivering such fund to the Alien Property Custodian on its own initative under sub-sections (d) and (e) of section 7 of the Trading with the Enemy Act.

VI. The Circuit Court of Appeals, in disposing of the fifth question, has decided a federal question that has never been, but should be, decided by this Court, viz.: Whether the paying away by a United States District Judge and United States District Court Clerk of a trust fund in the registry of their Court to the Alien Property Custodian in violation of stays provided by Federal law and the rules of their own court,—before determination of the question of its ownership as between the Custodian, a citizen and the rest of the world, which question had been freely submitted to said Court by said Custodian and said citizen, and before appeal from a decree ordering such surrender,—destroys all further jurisdiction of the District Court and all appellate jurisdiction of the appropriate Circuit Court of Appeals over such trust fund; all their power to compel the Custodian to repay it at least while still a party before those courts; all their power to adjudicate the liability to petitioner of the United States and decree his right of recovery therefrom, at least to the extent any of said trust fund found its way into its possession; and all their power further to consider the question of the propriety of such decree and, if wrong, correct it.

VII. The Circuit Court of Appeals in disposing of the fifth question has decided a federal question that has never been, but should be, decided by this Court, viz.: Whether the stay of execution required by the Revised Statutes, sections 1007 and 1012 as amended (*supra*, 7n.), prohibiting *inter alia* in an appealable case payment by the officers of a United States District Court of a trust fund in its registry until a period of ten days, Sundays excluded, shall have elapsed after the entry of a decree directing such payment, does not, for jurisdictional pur-

poses, in case of earlier payment in violation of said law, continue such stay in full force and effect until the fund shall have been restored to the court's possession and shall have remained therein for such further time as, added to the time that may have elapsed between the entry of said decree and said payment, makes up said period of ten days, excluding Sundays.

VIII. The questions here presented relate to property rights of a citizen of the United States under the Constitution in and to a trust fund in the registry of a United States District Court; which rights though duly asserted have been denied all consideration by the lower courts. They relate as well to the fiduciary obligations of federal judicial officers in respect to the conservation of that trust fund, which in plain violation of federal law and to the great detriment and injury of said citizen and suitor in that District Court has been by Judge and Clerk thereof paid away to another who had failed to establish, or even to offer any proof of, his right thereto. The questions are, therefore, of the greatest public importance.

Wherefore, your petitioner prays that a writ of certiorari be issued by this Honorable Court in the above-entitled cause to the Circuit Court of Appeals for the Third Circuit, requiring the latter to certify the said cause to this Honorable Court to the end that the questions involved therein may here receive due attention and consideration, and that the decree entered therein by the said Circuit Court may be reversed accordingly.

HOMER L. LOOMIS,
Petitioner.

State of New York, }
County of New York, } ss.:

HOMER L. LOOMIS, being duly sworn, deposes and says that he is a citizen of the United States, a resident of the State and City of New York, a member of the bar of this Honorable Court and each of the lower courts, and the petitioner above-named; that he has read the foregoing petition and is familiar with its contents and that the same is true to the best of his knowledge, information and belief. And deponent further certifies that he is of the opinion that it sets forth a proper case for the granting of the writ of certiorari prayed for; and further certifies that it is not filed for purpose of delay.

HOMER L. LOOMIS.

Sworn and subscribed to before me }
this 10th day of May, 1946. }

GEORGE SALTOUN
Notary Public, New York County
N. Y. Co. Clk's No. 15, Reg. No. 324-S-7
Bronx Co. Clk's No. 48, Reg. No. 202-S-7
Kings Co. Clk's No. 62, Reg. No. 398-S-7
Commission Expires March 30, 1947

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. .....

HOMER L. LOOMIS,
Petitioner,

against

UNITED STATES OF AMERICA

and

LEO T. CROWLEY,
Alien Property Custodian of the United States,
Respondents.

BRIEF IN SUPPORT OF PETITION

A

Introductory Statements

1

Report of Opinions Below

The opinion of the Court of Appeals, announcing its decision of affirmance, is reported in 153 F. 2d 138. No opinion was delivered by it on its denial of the petition for a rehearing.

The opinion of the District Court is reported in 58 F. Supp. ~~0274~~ 41.

2

Basis of Jurisdiction

The Basis of this Court's jurisdiction is set forth in the Petition (*supra,* 9-10).

3

Specifications of Error

Petitioner's specifications of error are set out in the Petition (*supra,* 12-23).

B

ARGUMENT

Summary of Argument

Petitioner was entitled under the due process clause of the Constitution (Fifth Am'd't) to his day in court, viz.: To an opportunity of defending his asserted right of property in and to the fund in the registry of the District Court when it was there assailed by another (*McVeigh* v. *United States,* 11 Wall. 259; *Windsor* v. *McVeigh,* 93 U. S. 274, 277; *Hovey* v. *Elliott,* 167 U. S. 409, 418; *Truax* v. *Corrigan,* 257 U. S. 313, 332). He had filed his petition in the appropriate manner (*United States* v. *422 Casks of Wine,* 1 Pet. 547, 549-550; Rule 42, U. S. Admiralty Rules); and it constituted a perfect assertion of title in equity to the fund (*Ketchum* v. *St. Louis,* 101 U. S. 306, 316, *et seq.; Walker* v. *Brown,* 165 U. S. 654, 664-665; *Ingersoll* v. *Coram,* 211 U. S. 335, 365-368; *Barnes* v. *Alexander,* 232 U. S. 117, 120, 121). The court held the fund in trust for those beneficially entitled thereto (*The Lottawanna,* 20 Wall. 201, 223) and, in its administration,

sat "as a court of equity and not of admiralty" (*The Guiding Star,* [C.C. S.D. O.], 18 Fed. 263, 268); and, therefore, was required to entertain and try all claims of interest therein though not independently enforceable in admiralty (*Andrews* v. *Wall,* 3 How. 568, 573; *Schuchardt* v. *Ship Angelique,* 19 How. 235, 241; *The Lottawanna, supra; The Edith,* 94 U. S. 518, 522; *The J. E. Rumbell,* 148 U. S. 1, 15; *The Albert Schultz,* 12 Fed. 156, 157).

The District Court's refusal to permit petitioner to defend his asserted title as against the assailing claim was based not upon the nature of petitioner's asserted title, but upon the fact that the United States by its Alien Property Custodian had purported to have captured the "right, title and interest, if any," therein of three named alien enemies. This the Court held to be equivalent to a finding by the Custodian that the alien enemies did in fact have not only *some* right, title and interest in the fund, but *every* right, title and interest therein; that it amounted, therefore, to a capture of the trust *res;* and that such capture of the *res,* though it already had long been in *custodia legis,* in litigation making it the jurisdictional right and duty of the court to determine the question of the title of everybody in the world therein, nevertheless made the alleged captor's title when asserted in said Court invulnerable to inquiry by Court as to, or defense by party because of, its alleged invalidity. And the Court held, therefore, that petitioner could not defend his title there, dismissed his petition accordingly and relegated him to the role of suitor under section 9(a) of the Trading with the Enemy Act (*supra,* 6n.) as made exclusive by section 7(c) thereof.

For such ruling there was no color of right: Had there been an attempt to capture a *res* in the Court's custody or a title thereto the Court was then in course of

adjudicating, a debatable question might conceivably have been presented. But here there was nothing of the sort. The terms of the vesting order showed not only that there had been no finding of any enemy interest subject to capture and that, therefore, no capture was possible (*Stoehr* v. *Wallace,* 255 U. S. 239, 244-245; *Hunter* v. *Central Union Trust Co.,* 17 F. 2d 174, 178) but also that it was only such particular "right, title and interest, if any," in the trust *res* as was possessed by three named alien enemies that was intended to be captured, and not the *res* itself, and that, therefore, there could not possibly have been any capture of title to the *res* (*Isenberg* v. *Trent Trust Co.,* [C.C.A. 9th Cir.], 26 F. 2d 609, 613, cert. den. 279 U. S. 862). Nor was the District Court, on its own initiative, entitled to avail itself of the privilege that private persons would have had under sub-sections (d) and (e) of the Trading with the Enemy Act (*supra,* 48) to deliver possession of the property as enemy-owned to the Alien Property Custodian; and, even had that remedy been available to it, would still, like private persons, have remained subject to the property claim of a citizen asserting such property to be his own.

The terms of the vesting order were unmistakably plain in their meaning and purpose. As such, they gave the Court no possible excuse for denying petitioner the right of defense he was urging. The ruling constituted, therefore, an arbitrary and capricious denial of the due process to which petitioner was entitled under the Fifth Amendment (*McVeigh* v. *United States, supra; Windsor* v. *McVeigh, supra; Hovey* v. *Elliott, supra; Truax* v. *Corrigan, supra*).

The Circuit Court of Appeals, however, *affirmed* the District Court's decree; and, in so doing, accepted as proper the ground on which the latter court had pro-

ceeded. For it held that "the seizure vested *title to the oil* in the Custodian" (R.). Its ruling and decree possess, therefore, no more color of right than that of the District Court; and are seen to be perhaps even more arbitrary and capricious in that, while in *The Aussa*, No. 1178 here, October Term, 1945, they reversed the District Court's ruling that the seizure had vested *title to the ship* in the Custodian, they refused to reverse—for the identical ruling in respect to the *oil*—the decree in the case at bar. The only difference between the two cases before the Circuit Court in respect to that ruling was that *libellant* was the appellant in one; *petitioner* in the other.

But, in addition to *affirming* because the proceeds belonged to the Custodian, the Circuit Court of Appeals ruled that the District Court was *wrong* in denying petitioner the right of defending his asserted property right in them, but that it *could not reverse* for that error because it was *without jurisdiction to hear his appeal* (R.).

The ground of the latter ruling was the surrender, by the Judge and Clerk of the District Court, of the trust *res* to the Custodian within *three days* (Sunday excluded) after entry of the decree, though that surrender plainly violated the mandate of sections 1007 and 1012 of the Revised Statutes as amended (*supra*, 7n.) providing for a ten-day stay of execution subsequent to the entry of decree, as well as the requirements of Rule 28 of the Admiralty Rules of their own court (*supra*, 8n.) providing for a ten-day stay of execution after service upon the opposite proctor of a copy of the decree with notice of filing. That surrender, the Circuit Court held, had destroyed all further jurisdiction in the District Court over trust *res* and cause, and thus, no *additional* stay *from the court* having been obtained in the meantime, had deprived

the Circuit Court of all appellate jurisdiction to consider and correct the decree (R.).

This was error. The loss of the *res* was ineffective to destroy the Courts' jurisdiction for several reasons, viz.: (1) The loss of the trust fund was due to conduct of Judge and Clerk that was at least improvident because contrary to right (*The Three Friends*, 166 U. S. 1, 68; *The I. F. Chapman*, [C.C.A., 1st Cir.], 241 Fed. 836, 840); (2) the loss of the trust fund was the result of a plain violation by Judge and Clerk of the Federal law they were sworn to uphold (R. S. secs. 1007, 1012, *supra*, 7n.; *The Rio Grande*, 23 Wall. 458, 463, 465); (3) it was the result of a plain violation by Judge and Clerk of a rule of their own Court, having, for them, the force of law (Dist. Ct's. 28th Adm. Rule, *supra*, 8n.; *Weil* v. *Neary*, 278 U. S. 160, 169-170); (4) the decree ordering the surrender of the trust fund was an arbitrary and capricious violation of the Fifth Amendment and, as such, not within the court's *judicial* power (*McVeigh* v. *United States, supra; Windsor* v. *McVeigh, supra; Hovey* v. *Elliott, supra; Truax* v. *Corrigan, supra*); (5) the cargo trust *res* and cause concerning it were mere incidents of the principal cause concerning the vessel *res*, over which the Circuit Court held it still had full jurisdiction, and, therefore, were still, in that event, subject to that Court's unimpaired jurisdiction to recall and control the *res* (*United States* v. *Ames*, 99 U. S. 35, 40-41, 42; *The Three Friends, supra; The I. F. Chapman, supra*), or, in the continued absence thereof, to try the controversy and award damages against any party that had received it, at least if a volunteer or with notice (*The Rio Grande*, 23 Wall. 458, 463, 465; *The Nuestra Señora de Regla*, 108 U. S. 92, 101, 102, 103), be that party the Custodian or his principal, the United States, (*The Siren*, 7 Wall. 152, 154, 159; *The Nuestra*

Señora de Regla, supra; The Thekla, 266 U. S. 328, 340, 341); and (6) petitioner's claim stated a perfect case of right, which could be enforced against any property still in the Court's possession, such as the principal *res,* the vessel,—which, together with just compensation therefor, the Circuit Court held to be still within its jurisdiction,—at least to the extent the party receiving the incidental *res* had an interest in the principal (*Finley* v. *Lynn,* 6 Cranch 238, 252; *The Adeline,* 9 Cranch 248, 284; *DuPont de Nemours & Co.* v. *Vance,* 19 How. 162, 173; *The Gazelle and Cargo,* 128 U. S. 474, 487; and *Liverpool Steam Co.* v. *Phenix Ins. Co.,* 129 U. S. 397, 447).

FIRST POINT

The Decree affirmed by the Circuit Court in denying Petitioner a defense of his equitable title in and to the Fund in the registry of the District Court denied him the due process to which he was entitled under the Constitution.

a

Petitioner's Claim stated a perfect cause of right to the fund and exercise of the District Court's jurisdiction.

The fund in the District Court's registry represented the net proceeds resulting from the Court's sale of a cargo of lubricating oil which had come into the Court's possession and control as an incident of its assertion of jurisdiction at the instance of the United States, over the principal *res* and cause, viz., the vessel "Brennero" and the question of her ownership. As such, it constituted a remnant and surplus.

The District Court, therefore, held "the fund in trust" for those persons having the right thereto (*The Lotta-*

wanna, 20 Wall. 201, 223); and, in its conservation and distribution of that fund, was "administering its jurisdiction as a court of equity and not of admiralty" (*The Guiding Star,* [C.C.S.D.O.], 18 Fed. 263, 268). *Cf. Hartford Accident Co.* v. *Sou. Pacific,* 273 U. S. 207, 216-218, and *Just* v. *Chambers,* 312 U. S. 383, 386.

The act of the United States, in thus proceeding, though indirectly, against the cargo and thus bringing it into the Court's custody, and in thus directly moving for and obtaining its conversion into cash and the deposit thereof in the Court's registry, left no alternative to those claiming an interest therein but to come into court and there protect that interest. This, petitioner did. Intervening by petition under the 42nd of the Admiralty Rules of this Court (*supra,* 2n.), he therein alleged an agreement with the owner of the *res* that his professional services and disbursements, rendered and incurred at the instance of that owner in connection with that *res,* as well as other property, "should be chargeable as a lien thereon, and should be recoverable therefrom" (35a); that, by said agreement, made in April, 1941, (67a), the "cargo of lubricating oil," as well as other property, "should be so chargeable, and was then and there so charged, with a lien for any and all such compensation" as "thereafter might be earned by, and become due to, him for any and all services that might thereafter be rendered by him pursuant to the said retainer, and for any and all disbursements that might be incurred by him in connection therewith" (67a-68a); and that "in reliance upon said agreement for a lien," he had "thereafter performed extensive and laborious legal services" (R. 68a), as more particularly set out and described in the petition (68a-81a).

That stated a perfect case of property interest in and to the fund at least as against the owner and third persons

that either were volunteers or had notice (*Ketchum* v. *St. Louis,* 101 U. S. 306, 316, *et seq.; Walker* v. *Brown,* 165 U. S. 654, 664-665; *Ingersoll* v. *Coram,* 211 U. S. 335, 365-368; *Barnes* v. *Alexander,* 232 U. S. 117, 120, 121; *Williams* v. *Ingersoll,* 89 N. Y. 508, 515, 519, 521, 523; *Terney* v. *Wilson,* 45 N. J. L. 282, 284-285; *Wilson* v. *Seeber,* 72 N. J. Eq. 523, 532, *et seq.; Patten* v. *Wilson,* 34 Pa. 299, 300; Pomeroy's Equity Jurisprudence [Fifth Ed. 1941], Vol. 4, sec. 1235, p. 696). As to such, it constituted a trust estate in the fund (*Legard* v. *Hodges,* 1 Ves. Jr. 478; *Ketchum* v. *St. Louis, supra*). As this Court, in *Ketchum* v. *St. Louis, supra,* quoting with approval a passage from Story's Equity Jurisprudence (Vol. II, sec. 1231), said (316-317):

> "Indeed, there is generally no difficulty in equity in establishing a lien, not only on real estate, but on personal property, or on money in the hands of a third person, *wherever that is a matter of agreement,* at least against the party himself, and third persons who are volunteers or have notice; *for it is a general principle in equity that as against the party himself, and any claiming under him voluntarily or with notice, such an agreement raises a trust.*" (Emphasis supplied.)

Here the District Court, holding the fund as trustee for those having the right and charged, as it was, with the task of marshalling in the order of their proper rank and priority, any and all claims that might be filed against the same and of distributing the fund accordingly, was as pointed out *supra,* to that extent charged with the duties of, and sitting as, a court of equity. And trust estates in the fund, such as petitioner's, though not capable of supporting an original and independent action in admiralty, yet constituted here a perfect subject for

judicial consideration and judicial enforcement (*Andrews* v. *Wall*, 3 How. 568, 573; *Schuchardt* v. *Ship Angelique*, 19 How. 239, 241; *The Lottawanna, supra; The Edith*, 94 U. S. 518, 522; *The J. E. Rumbell*, 148 U. S. 1, 15; *The Atlantic City*, [C.C.A., 3rd Cir.], 220 Fed. 281, 286; *The Albert Schultz*, [D.C.E.D. La.], 12 Fed. 156, 157; *His Majesty's Government, etc.* v. *Compagnie G. T.*, [D.C., E.D. N.Y.], 40 F. Supp. 650, 653).

> "An ordinary mortgage of a vessel, whether made to secure the purchase money upon the sale thereof, or to raise money for general purposes, is not a maritime contract. A court of admiralty, therefore, has no jurisdiction of a libel to foreclose it, or to assert either title or right of possession under it. *The John Jay*, 17 How. 399; *The Eclipse*, 135 U. S. 599, 608. *But it has jurisdiction, after a vessel has been sold by its order, and the proceeds have been paid into the registry, to pass upon the claim of the mortgagee, as of any other person, to the fund,* and to determine the priority of the various claims, upon petitions such as were filed by the mortgagees and the material men in this case" (Emphasis supplied.)
>
> *The J. E. Rumbell, supra*, 15.

The equity jurisdiction is exercised by a court of admiralty in such a case very much as in the case of limitation of liability proceedings (*Providence Steamship Co.* v. *Hill Manufacturing Co.*, 109 U. S. 578; *Hartford Accident Co.* v. *Sou. Pacific*, 273 U. S. 207, 215, 216-218).

b

The lower Courts' refusal to permit Petitioner to defend in court his asserted Property Right when there assailed, constituted an arbitrary and capricious Denial of Due Process.

Petitioner neither brought nor consented to the bringing of his property into the District Court. It was brought there under process issued at the instance of the United States. He intervened in that Court thereafter only because he had to if he wished to save his property from the proceedings there in course of being conducted against it (*Schuchardt* v. *Ship Angelique, supra,* 241). Parties that so intervene are parties not merely for the purpose of enforcing their own rights, "but of contesting the claims of others interfering with their own" (*The Phebe,* [D.C. D. Me.], 1 Ware [354] 360, [360] 366, 19 Fed. Cas. 424, 426, Case No. 11,065).

Under the Fifth Amendment it was the duty of the District Court to afford petitioner his day in court when his property was there thus assailed by another, even a sovereign, and an opportunity to establish his defense of title (*McVeigh* v. *United States,* 11 Wall. 259, 267; *Windsor* v. *McVeigh,* 93 U. S. 274, 277, 278; *Hurtado* v. *California,* 110 U. S. 516, 535-536; *Hovey* v. *Elliott,* 167 U. S. 409, 418; *Truax* v. *Corrigan,* 257 U. S. 312, 332).

> "And that the judicial department of the government is, in the nature of things, necessarily governed in the exercise of its functions by the rule of due process of law, is well illustrated by Judge Cooley, * * * saying: '* * * judicial proceedings * * * cannot be valid unless they "proceed upon inquiry," and "render judgment only after trial."' "
>
> *Hovey* v. *Elliott, supra,* 418.

> "The due process clause requires that every man shall have the protection of his day in court, and the benefit of the general law, a law which hears before it condemns, which proceeds not arbitrarily or capriciously but upon inquiry, and renders judgment only after trial, so that every citizen shall hold his * * * property * * * under the protection of the general rules which govern society."
>
> *Truax* v. *Corrigan*, 257 U. S. 312, 332.

That duty of the District Court applied with peculiar propriety to the proceeds it was holding in its registry in trust for the true beneficial owners thereof. As was said by Judge Ware in *The Phebe, supra,* ([359] 365 in 1 Ware; 425-426 in 19 Fed. Cas.):

> "It is the familiar and daily practice of the admiralty to entertain petitions against the proceeds in the registry, in favor of creditors having a privilege against the vessel. The proceeds of the vessel are as much pledged to them as the vessel herself. The Court having possession of the pledge, which it has from the time it is arrested under its process, it necessarily becomes a duty to preserve it for all who have an interest in it, or claims upon it. *If it allowed claims to be interposed and paid before the legal right of the claimant was established, it would be nothing else then allowing a man's property to be taken from him without his consent, and without judgment of law*" (Emphasis supplied).

That was the denial of due process to which the District Court here subjected petitioner. His claim of right to defend in court his property when assailed in court was dismissed unheard, and his property without a trial turned over to the party there assailing it.

The District Court's excuse for denying petitioner his day in court, for denying him the right of defending his

property in court against an attack in court, and for surrendering it to another without a trial of petitioner's defense to that other's claim, was that such other was the United States, that petitioner's claim was in effect *a suit against the United States,* that the United States was not subject to suit without its consent, and that it had consented to be sued by petitioner not otherwise than under section 9(a) of the Trading with the Enemy Act (*supra,* 6n.), that is, by his first filing a notice of claim with the Alien Property Custodian and, in the event of its remaining unsatisfied, proceeding against him by suit in equity in the appropriate District Court.

For that excuse there was no color of justification. The theory that underlay it was that the Custodian had, in vesting order No. 52 (R. 52a), purported to capture *the fund* in the registry of the Court, the District Court saying (R. 93a):

> "The Custodian, upon seizure of 'the proceeds of the cargo,' acquired absolute title to the fund on deposit in the registry of the Court * * *."

But the vesting order itself left no room for any such theory. In unmistakably plain terms, it declared that what the Custodian was purporting to seize was *not* the *res itself,* but only such "right, title and interest therein, if any," *as was owned by three named alien enemies,* viz., Societa Anonima Cooperativa di Navigazione Garibaldi, the Royal Italian Government and the Italian Navy (R. 52a, 53a, 57a); that the Custodian *had not found* and *did not claim* that any of those three did in fact have any such interest in the fund (R. 54a); and that his intention, in making the order, was merely to effect *a substitution of himself for the three enemies* "in respect of any right, title or interest they, or any of them, *may have*" in the same (R. 54a).

Nowhere and in no manner did the Custodian in said vesting order purport to capture the interest in said fund of petitioner or any other non-enemy. On the contrary, that order explicitly set forth the reverse of that proposition. It read (R. 53a):

> "Nothing in this order shall be construed as impairing the right * * * of any person interested except Claimants" (of the vessels), "and each of them, and except other enemies; * * *."

Thus, as plainly as words could say, the Custodian informed the Court that the interest of petitioner in said fund remained uncaptured, untouched and unaffected by that order. And the decree of the Court to the contrary was, therefore, a merely arbitrary and capricious abuse of the Court's jurisdiction without a colorable basis of right or warrant therefor.

The capture of a particular person's right, title or interest in a *res* involved in litigation confers upon the Custodian, at the best, no right of possession to anything but that particular right, title or interest, and that cannot be known or delivered until the Court has determined whether and to what extent it exists.

If authority for such a plain proposition were necessary, it is supplied by the decision of the Ninth Circuit Court of Appeals in *Isenberg* v. *Trent Trust Co.*, 26 F. 2d 609, cert. den. 279 U. S. 862. There the *res* was shares of stock, in respect to which the Custodian had captured such "right, title and interest" therein as was owned by certain named alien enemies. Such a capture, the Ninth Circuit Court ruled, conferred upon the Custodian no right of dominion over the *res*, but only over the "right, title and interest," if any, captured; and a dominion, therefore, which could in no event be exercised until the Court in

whose possession the *res* was, determined what such "right, title and interest," if any, might be.

> "Until the respective rights of the trustee and the beneficiaries were judicially determined, no rights in any particular portion of the corpus of the trust were confiscable by the Custodian, for he was not vested with title to the corpus, or to any particular portion thereof, but, if vested at all, was vested only with the right, title and interest of the beneficiaries * * *."
>
> *Isenberg* v. *Trent Trust Co., supra,* 613.

In the case at bar, it is to be noted, the Custodian never questioned the soundness of the decision of the Ninth Circuit Court of Appeals; never claimed that his capture of the undetermined "right, title and interest, if any," of the alien enemies entitled him, in and of itself, to possession of the fund; but claimed it only because of the *alleged invalidity of petitioner's claim to a lien:* His position was (R. 49a):

> "that said proctors are not entitled to be paid any fees from the proceeds of the sale of said cargo *because they rendered no services which in any manner benefited the res,* consisting of said cargo, but that such proctors should be remitted to administrative proceedings before your petitioner" (the Custodian), "who will consider their claims as *creditors* of the Royal Italian Government, *whose* title he has acquired by such Vesting Order" (Emphasis supplied.)

Thus, the District Court, in ruling that the Custodian had captured not merely the alien enemies' title, if any, but the whole title of the world in the *res,* "absolute title to the fund * * * and a right to its immediate

possession" (R. 93a), was disregarding both the terms of the vesting order and the position assumed before him by the Custodian.

Nor was the action of the Circuit Court of Appeals any less arbitrary and capricious. It affirmed the decree of the District Court (R.) and upheld the ruling on which it was based, saying, (R.):

> "The Custodian * * * seized the cargo as well as the ship. The seizure vested *title to the oil* in the Custodian." (Emphasis supplied.)

In so ruling and decreeing, it disregarded not only the terms of the vesting order, the position assumed by the Custodian in his own petition (R. 49a-50a) as noted *supra*, (45), and the decision of the Ninth Circuit Court in *Isenberg* v. *Trent Trust Co., supra,* but also the position assumed in Custodian's appellate brief in *The Aussa,* which is No. 1178 here, October Term, 1945. The Custodian there argued that the Circuit Court should reverse the District Court for the very error here complained of. His Circuit Court brief on the cross-appeal read as follows (5):

> "We agree with the contention of the United States as libellant that Judge Smith *was in error* in dismissing the cause for want of jurisdiction on the ground that it had become moot, *because the court below misconstrued the nature of the Custodian's vesting order, which was not a vesting of the res, consisting of the ship herself, but a vesting only of the right, title, and interest of the claimant in the ship* * * *."

And the Circuit Court contention of the United States as libellant and appellant in *The Aussa, supra*—with which the Custodian was there, as noted *supra,* in perfect agreement—was, as set forth in the heading of the First Point in its brief (15):

> "The Alien Property Custodian has not vested the entire *res,* but only the enemy claimants' interest therein."

And, in the ensuing development of that point, it emphasized that the Custodian had "not acquired *all* right, title, and interest", but only the particular interest, if any, of the named alien enemies (15); and added that

> "The extent of the interest of the Italian claimants in each of the vessels" (which, as described in the vesting order, included, in the case of the "Brennero," her cargo of lubricating oil [R. 53a]) "has never been established and it may well be that when the Vesting Order was made, the Italian claimants did not have any interest in the vessels. Unknown to the Alien Property Custodian or to proctors for the owners-claimants, their former interests, if any, in the vessels may have been sold, mortgaged, or otherwise transferred or encumbered, in which event *the Alien Property Custodian may not have acquired anything*" (Emphasis supplied).
>
> *The Aussa, supra,* Circuit Court Brief of the United States, 15.

The Circuit Court of Appeals, though *granting* (R.) the said request of the *United States,* both as libellant and as Custodian, to reverse the District Court decree in *The Aussa, supra,* for *that* particular error when committed against *libellant,* nevertheless *refused petitioner's* request to reverse the same Court's decree for the very same error when committed against *petitioner.* On the contrary, it *affirmed* the District Court's decree against *him* (R.) and *agreed* with it that "the seizure vested *title to the oil* in the Custodian" (R.).

That decision and decree constituted an arbitrary and capricious denial to petitioner of the due process guaranteed him by the Constitution (cases *supra,* 41, 42).

Three conditions must have been present to warrant the lower Courts' surrendering to the Custodian the proceeds in the registry without requiring him to establish his claim and permitting petitioner to establish his defense thereto. Those were: (1) A demand from the Custodian for the proceeds as the captor thereof; (2) a finding of enemy interest therein to support such capture and demand; and (3) the showing of a constitutional grant to the Custodian by Congress of power to capture the property in *custodia legis*.

None of those three conditions was present.

1. The District Court was without power, in the absence of a demand from the Custodian, to avail itself of the privileges accorded to private persons by subsections (d) and (e) of section 7 of the Trading with the Enemy Act* and deliver to that official the *res* reposing in *Custodia legis* while title thereto was being adjudicated. Congress purported to give the Court no such permission to abdicate on its own initiative, its judicial functions touching such property; and it is inconceivable that it meant to. The Court unlike private persons, had solemn, if not sacred, jurisdictional duties to perform in respect to the

---

* These sub-sections read as follows:

"(d) If not required to pay, convey, transfer, assign, or deliver under the provisions of subsection (c) hereof, any person not an enemy or ally of enemy who owes to, or holds for, or on account of, or on behalf of, or for the benefit of an enemy or of an ally of enemy not holding a license granted by the President hereunder, any money or other property, or to whom any obligation or form of liability to such enemy or ally of enemy is presented for payment, may, at his option, with the consent of the President, pay, convey, transfer, assign, or deliver to the alien property custodian said money or other property under such rules and regulations as the President shall prescribe.

"(e) No person shall be held liable in any court for or in respect to anything done or omitted in pursuance of any order, rule, or regulation made by the President under the authority of this Act.

"Any payment, conveyance, transfer, assignment, or delivery of money or property made to the alien property custodian hereunder shall be a full acquittance and discharge for all purposes of the obligation of the person making the same to the extent of the claim."

property in its possession. "The existence of the jurisdiction creates an implication of duty to exercise it. . . ." (*Second Employers' Liability Cases,* 223 U. S. 1, 5-8).

In *The St. Lawrence,* 66 U. S. 522, this Court, speaking of the admiralty jurisdiction of a United States Circuit Court, said (526):

> "the court could not consistently with its duty, refuse to exercise a power" with "which the Constitution and law clothed it, when its aid was invoked by a party who was entitled to demand it as a matter of right."

And in another case this Court said:

> "the courts of the United States are bound to proceed to judgment and to afford redress to suitors before them in every case to which their jurisdiction extends. They cannot abdicate their authority or duty in any case in favor of another jurisdiction. *Suydam* v. *Broadnax,* 14 Pet. 67; *Union Bank* v. *Jolly's Administrators,* 18 How. 503."
>
> *Chicot County* v. *Sherwood,* 148 U. S. 529, 534.

See also *McClellan* v. *Carland,* 217 U. S. 268, 281.

The withheld exercise of a present jurisdiction is quite as unwarranted as the attempted exercise of an absent. Each is "treason to the constitution" (*Cohens* v. *Virginia,* 6 Wheat. 264, 404).

That Congress intended to repeal, cancel and annul this underlying duty of the District Court, in the general terms and provisions it made applicable to private persons in sub-sections (d) and (e) of section 7 of the Trading with the Enemy Act is, then, incredible. If it had so intended, it is unthinkable that it would not have said so; and all the more so in view of the fact—which it must be taken to have been well aware of at the time of the

Act's passage—that repeals by implication of statutory duties are not favored in the law (*Ex parte Crow Dog,* 109 U. S. 556, 570; *Rodgers* v. *United States,* 185 U. S. 83; *Washington* v. *Miller,* 235 U. S. 422, 428; *Graham & Foster* v. *Goodsell,* 282 U. S. 409, 425; *Morf* v. *Bingaman,* 298 U. S. 407, 414).

2. The District Court was without power to surrender the *res* to the Custodian, in the absence of a finding by that official or other with like authority that *all* interest in the *res* was owned by an alien enemy. If the Custodian had found that an alien enemy owned *merely some* interest in it, *not all,* that would not have entitled the former to assert dominion over the *res* (*Isenberg* v. *Trent Trust Co.,* 26 F. 2d 609, 613, cert. den. 279 U. S. 862). But here he failed and refused to find that an alien enemy had *any* interest *whatever* in the *res.* All the more unsustainable, then, was his claim here to ownership and possession of the proceeds; and all the more unjustifiable the lower Court's yielding him that *res* without a trial (*Stoehr* v. *Wallace,* 255 U. S. 239, 244-245; *Hunter* v. *Central Union Trust Co.,* [D.C. S.D. N.Y.], 17 F. 2d 174, 175, 178).

3. The District Court was without power to surrender the *res* to the Custodian in the absence of a showing by him that he had received by a constitutional grant from Congress the power to capture the proceeds in the Court's registry while the same was there held in trust awaiting the Court's decision as to the identity of the party or parties entitled to their possession.

It has been shown *supra* (48-50) that the District Court could not of its own initiative abdicate its jurisdiction in favor of the Custodian. No more could it do so at his demand unless that demand was authorized by

the law. But there was no law that authorized it. The Trading with the Enemy Act (*supra,* 6n.), here relied on by the Custodian as his warrant of power, purported to give him no such authority. And, as has been shown *supra* (48-50) it is contrary to reason and long-settled rules of statutory construction to infer from the general language of that Act any purpose on the part of Congress to give to the Custodian or any other officer of the Executive Department the power to receive, much less to invade, the jurisdiction of the judicial department.

The only alleged grant of authority to which either of the lower courts pointed (R. 93a n. [2]), as justifying their attribution to him of any such power, was section 2(f) of Executive Order No. 9095 as amended by Executive Order No. 9193 *supra* (14). That sub-section purports to authorize the Custodian to "vest, with respect to
* * *

> "(f) any property of any nature whatsoever which is in the process of administration by any person acting under judicial supervision or which is in partition, libel, condemnation or other similar proceedings and which is payable or deliverable to, or claimed by, a designated enemy country or national thereof."

But that was at best but an executive grant of authority; and, unless authorized by some suitable delegation of Congressional power, was without effect (*Brown* v. *United States,* 8 Cranch 110, 123, 126, 127, 128, 129; *Miller* v. *United States,* 11 Wall. 268, 305; *Stoehr* v. *Wallace,* 255 U. S. 239, 241-242).

Beyond the Trading with the Enemy Act *supra,* it is not nor could be claimed there was any legislation purporting to bestow upon the President the power of capture of enemy property found within this land. And that

Act, as noted *supra,* purports to give the Executive Department no power to accept or exercise a jurisdiction over property otherwise exclusively within that of the Judicial Department. And, for the reasons discussed above, the general language of the Act may not justly be construed to imply such a power.

But even could such a power be implied under other circumstances, its implication here must fail because of the special nature of the property here involved, viz., proceeds resulting from the sale of cargo which was found on a ship requisitioned to perform charter service for the United States and which was discharged as an incident of and a step prerequisite to the rendition of such service. The ship herself was immune to capture (Petitioner's Brief in *The Antoinetta,* No. 1172 here, October Term, 1945); her cargo must have been no less immune.

From the foregoing it results that the lower Courts' refusing to petitioner a trial of his proffered defense to the Custodian's claim was an arbitrary and capricious denial of his constitutional guaranties of due process.

SECOND POINT

The Circuit Court of Appeals erred in holding that it was without jurisdiction to hear petitioner's appeal.

The Circuit Court of Appeals, besides affirming the decree there complained of, held that the District Court was wrong in denying petitioner's claimed right to protect his property, insofar as he had a valid title against the Custodian's assailing claim (R. a). But, it further held, it was powerless to reverse because it was without jurisdiction to entertain petitioner's appeal.

The basis for this holding was that the cargo proceeds had been paid out pursuant to the District Court's erroneous decree before Petitioner had lodged his appeal; that the District Court in such loss of the *res,* had lost its *in rem* jurisdiction further to proceed in the cause concerning that *res;* and that, therefore, the question of the propriety of that decree had become moot for the Circuit as well as the District Court (R. a).

That holding, petitioner contends, is unsustainable because the surrender of the *res* was improvident, contrary to right and in violation of the express mandate of the Federal law and a rule of the District Court having, for it and the reviewing Court, the force of law; because its surrender constituted a breach of trust with respect to a trust fund that was being administered by the District Court as a court of equity; because, as such court, its process was issuable *in personam* as well as *in rem;* and because, even though the *res* had been removed beyond its jurisdiction, it had before it still the party or parties who had wrongfully received and removed the *res,* with knowledge of the breach of law and trust involved, and who, therefore, were still subject to the Courts' *in personam* process requiring its return or, in the event it was not returned, payment to the petitioner of its value if and to the extent he established his asserted right thereto.

The prime fallacy of the reasoning whereby the Court of Appeals evidently reached its conclusion,, was its apparent assumption that an Admiralty Courts' *in rem* jurisdiction departs with the *res,* regardless of the circumstances attending the latter's departure; whereas the true rule would seem to be that the jurisdiction never disappears with the *res* when the latter's disappearance is the result of improvidence, mistake, fraud, breach of trust, or violation of law or rule having the force of law.

And particularly, it would appear, such court will not hear an attack upon its jurisdiction for loss of the *res* from the very party who himself removed it or participated in its removal; since to permit such would be to permit that party to profit from his own wrong.

A second error in the Circuit Court's said reasoning would seem to have been its overlooking the fact that, in administering a trust fund, as was the District Court here, it acts as a court of equity and, therefore, by process *in personam* may decree restitution against those who have received it and, because of being volunteers or taking with notice, have themselves become charged with the trust; and that, even though the receiver in such case be a sovereign, his sovereign immunity may not be urged against the Courts' jurisdiction to enter such decree, at least where he by his own choice has become and still is a party to the cause before the Court.

And a third flaw present in the Court of Appeals theory that it wanted jurisdiction to hear the appeal, was its failure to recognize and vindicate for jurisdictional purposes the stays of execution in petitioner's favor provided by Federal law and the District Court's own rules.

These errors were vital.

a

The admiralty *in rem* jurisdiction of a United States District Court survives the loss of its *res* where the latter is removed improvidently or in violation of law.

In *The Rio Grande,* 23 Wall. 458, this Court held that the District Court's surrender of the *res* there involved in violation of a stay similar to that of the Revised Statutes, sections 1007 and 1012, *supra* (7n.), was ineffec-

tive to deprive the Court of its jurisdiction. It said (465):

> "We hold the rule to be that a valid seizure and actual custody of the *res* by the marshal gives jurisdiction of the subject-matter, and that an accidental or fraudulent or improper removal of it from his custody * * * does not destroy jurisdiction. In the present case the order for restoration was in direct violation of the statute regarding appeals, and did not operate to destroy the jurisdiction of the Circuit Court. That court was authorized to proceed as if no such order had been made."

In *The Nuestra Señora de Regla,* 108 U. S. 92, a steamer was libelled in the United States District Court as prize in the midst of the Civil War. After a claim had been filed by her alleged owner, the United States moved for and obtained her possession on behalf of the Navy. In delivering such possession, the District Court entered an order providing *inter alia* that

> "said steamer be delivered to the navy department for the use of the government, upon filing in court a certificate of the assistant treasurer of the United States in New York that the amount of the appraisement has been deposited in the United States treasury, subject to the order and disposal of the court on final decree in the case."

The certificate of deposit so provided for, however, was never filed.

Thereafter the case was heard on the merits and a decree entered providing for the vessel's restitution to her claimant. In course of time thereafter, that decree never having been complied with by the United States, a further decree was entered against that party for, among other things, her appraised value.

On appeal to this Court from said decree, the United States argued a want of jurisdiction in the District Court to enter the decree against the United States. That contention, however, was rejected and the decree sustained, though in reduced amount. In so ruling, this Court said (104):

> "It is not a matter of any importance that the certificate of deposit in the treasury of the amount of her appraised value was not filed. By taking the vessel on the terms imposed by the court, the United States impliedly agreed to restore her in as good condition as she was when taken, or pay her value in money."

Having taken the *res* in violation of the terms of a valid order of court, the party so taking her was bound by an implied agreement to return her when called upon to do so, or, in lieu thereof, pay her value into court. The same rule must no less apply when the *res* is taken by a party in violation of the terms of a Federal law or the terms of a rule of court having the force of law, or in violation of a trust. The implied obligation to return the *res* or its value takes the place of the thing. And the court's *in rem* jurisdiction remains in effect.

The foregoing rule has frequently been applied and enforced. In *The Three Friends*, 166 U. S. 1, a forfeiture cause, the *res*, a vessel, was released on bail in violation of law and the libel subsequently dismissed on exceptions. While an appeal was pending in the appropriate Circuit Court of Appeals, on the ground, among others, of such improper release of the *res*, a writ of certiorari was applied for and granted by this Court, where the decree was reversed, the release declared improvident, and the recall of the *res* ordered. In so ruling, this Court said (68):

> "it is enough to hold that, under the circumstances of this case, the vessel should not have been released

> as it was, and should be recalled on the ground that the order of release was improvidently made."

In so deciding, in *The Three Friends supra,* this Court cited *United States* v. *Ames,* 99 U. S. 35, where it was indicated (42) that the "better reason" supports those cases which

> "hold that in case of misrepresentation or fraud, or in case the order of release was improvidently given without any appraisement or any proper knowledge of the real value of the property, it may be recalled before judgment where the ends of justice require the matter to be reconsidered. *The Hero,* Brown & Lush. 447; *The Union,* 4 Blatchf. 90; *The Duchese,* Swabey, 264; *The Flora,* Law Rep. 1 Adm. 45; *The Virgo,* 13 Blatchf. 255."

Other cases to the same effect are *The I. F. Chapman supra; United States* v. *Mackoy,* 2 Dill. 299, 305-306, 26 Fed. Cas. 1,123, 1,125, Case No. 15,696; and *Livingston* v. *The Jewess,* 1 Ben. 19n., 15 Fed. Cas. 665, Case No. 8,412.

It would seem clear, then, that, in the exercise of its admiralty *in rem* jurisdiction, a District Court's power to act is not dependent upon the merciful abstention of others from abstracting its *res.*

b

The equity jurisdiction of a United States District Court administering in admiralty a remnant and surplus survives its loss.

The District Court, though sitting as a court of admiralty, was, in dealing with the proceeds of the "Brennero's" cargo, exercising an equity jurisdiction (*The Lottawanna, supra,* 223; *The Guiding Star, supra,* 268), like that exercised by such a court in limitation of liability

proceedings (*Providence Steamship Co.* v. *Hill Mdnufacturing Co.*, 109 U. S. 578; *Hartford Accident Co.* v. *Southern Pacific, supra,* 215, 216-218). It exercises, therefore, a personal as well as an *in rem* jurisdiction (*The City of Norwich,* 118 U. S. 468, 503; *Hartford Accident Co.* v. *Southern Pacific, supra*) and "may enter judgment *in personam* . . . as well as judgment *in rem*" (*Hartford Accident Co.* v. *Southern Pacific, supra*).

In such a court and case, it is, therefore, quite immaterial that the *res* has slipped without the jurisdiction so long as the parties controlling it or responsible for its loss are still within the jurisdiction (*Massie* v. *Watts,* 6 Cranch 148, 158, 159, 160; *Lewis* v. *Darling,* 16 How. 1, 13; *Corbett* v. *Nutt,* 10 Wall. 464, 475; *Muller* v. *Dows,* 94 U. S. 444, 449-450; *Phelps* v. *McDonald,* 99 U. S. 298, 308; *Ager* v. *Murray,* 105 U. S. 126, 131).

Here the party or parties that had received the *res* and had removed it, if it was removed, beyond the jurisdiction, were still before the District Court and amenable to its *in personam* process. The Court's jurisdiction, therefore, necessarily survived the loss of the *res.* As this Court said in *Phelps* v. *McDonald,* 99 U. S. 298, 308:

> "Where the necessary parties are before a Court of Equity, it is immaterial that the *res* of the controversy, whether it be real or personal property, is beyond the territorial jurisdiction of the tribunal. It has the power to compel the defendant to do all things necessary, according to the *lex loci rei sitae,* which he could do voluntarily, to give full effect to the decree against him.
>
> "Without regard to the situation of the subject-matter, such courts consider the equities between the parties, and decree *in personam* according to those equities, and enforce obedience to their decrees by process *in personam,* 2 Story, Eq., sect. 899;

Miller v. *Sherry,* 2 Wall. 249; *Penn* v. *Lord Baltimore,* 1 Ves. 444; *Mitchell* v. *Bunch,* 2 Paige (N. Y.) 606."

No exception, it would seem, is known to the rule that

> "decrees of a court of equity, which are *in personam,* may be enforced in all cases where the person is within its jurisdiction."
>
> *Ager* v. *Murray,* 105 U. S. 126, 131.

This undoubted general jurisdiction of equity *in personam* was peculiarly present in the case at bar. The proceeds of the cargo were held by the District Court in trust (*The Lottawanna, supra,* 223). And a party or parties still before it had wrongfully received it as volunteers and with knowledge of the breach of trust involved in their doing so. Hence, not only was the *res* in their possession still impressed with the trust but they were personally liable, if they had rendered it inaccessible, to make good its value (*Pennell* v. *Deffell,* 4 De Gex, M. & G. 372, 388; *Mechanics Bank* v. *Seton,* 1 Pet. 299, 309; *Oliver* v. *Piatt,* 3 How. 333, 401; *Union Pacific Railway Co.* v. *McAlpine,* 129 U. S. 305, 314; *United States* v. *Dunn,* 268 U. S. 121, 132).

This Court in *United States* v. *Dunn supra,* in applying the foregoing rule as to the continuance of the trust and by way of quotation from *Pennell* v. *Deffell supra* (388), said (132):

> "It is an undoubted principle of this court that as between a *cestui que trust* and trustee and all parties claiming under the trustee, otherwise than by purchase for valuable consideration without notice, all property belonging to a trust, however much it may be changed or altered in its nature or character, and all the fruits of such property,

> whether it is in its original or its altered state, continue to be subject to or affected by the trust."

And, dealing with the recipient's personal liability under the said rule, this Court, in the same case, continued (133):

> "Dunn and Gillam, when they fraudulently acquired the Thomas lease by the corrupt action of the guardian, which action they actively induced, became trustees *ex maleficio* of the lease, and as such trustees they became equitably bound to hold the lease for the benefit of the ward or, in the event of a sale or other disposition of it, to hold its proceeds upon a like obligation. Any other rule would enable the fraudulent recipient of trust property, acquired through a breach of trust, *to render himself immune* to the remedial action of equity *by the simple expedient of transferring* the trust *res* thus acquired *to an innocent purchaser for value, or otherwise placing it beyond the reach of the defrauded beneficiary of the trust.*"
>
> *United States* v. *Dunn supra,* 13.

It cannot be doubted, then, that, in the case at bar, the District Court's equity jurisdiction *in personam,* as well as its admiralty *in rem* jurisdiction, persisted despite its surrender of the *res.*

c

Sovereign immunity presents no obstacle to the exercise of the jurisdiction of a United States Court, either admiralty *in rem* or equity, to which the sovereign has voluntarily submitted.

First, as to the admiralty *in rem* jurisdiction: Below, the Custodian argued both orally and in his brief that such jurisdiction as the lower Courts might possess

against other parties, could not be applied to or enforced against the sovereign United States because of its immunity to suit and because, as the Custodian stated though the record did not indicate, the *res* here, the cargo proceeds, had been deposited in the United States Treasury. But, it seems clear, *neither* the latter circumstance, if true, nor the sovereign's general immunity to suit, can offer a material obstacle to the application and enforcement of the rule in this case. *For, here, the sovereign had voluntarily made himself a party to the cause and still remains a party to the cause.* That fact clearly differentiates this case from those wherein the doctrine of sovereign immunity has been applied.

In *The Siren,* 7 Wall. 152, the Federal Government advanced, but failed to sustain, the same argument as that made by the Custodian below. There, a steamer captured at sea by the United States Navy was, while being taken to Boston for adjudication as prize, in collision with and sank a sloop. The fault was solely that of the steamer. Subsequently libelled as prize by the Government in the United States District Court in Boston, she was sold and the proceeds of her sale deposited with the Assistant Treasurer of the United States, subject to the order of the court. Later the owners of the sloop and her cargo, respectively, intervened, filing petitions for the payment of their damages out of such fund. The District Court, as in the case at bar, entered a decree dismissing the petitions on the ground that they constituted in effect a suit against the United States, and the United States had never consented so to be sued. This Court on appeal, however, reversed the District Court's decree, and in that connection said (154):

> "Although direct suits cannot be maintained against the United States, or against their prop-

> erty, yet, when the United States institute a suit, they waive their exemption so far as to allow a presentation by the defendant of set-offs, legal and equitable, to the extent of the demand made or property claimed, and when they proceed *in rem*, they open to consideration all claims and equities in regard to the property libelled. They thus stand in such proceedings, with reference to the rights of defendants or claimants, precisely as private suitors, except that they are exempt from costs and from affirmative relief against them, beyond the demand or property in controversy."

That case, as pointed out *supra*, involved, just as does the case at bar, a remnant and surplus consisting of the proceeds resulting from a sale of the *res*. And, in pointing out that the doctrine of sovereign immunity has no application to that kind of a case, where the United States has made itself a party to the cause, this Court continued (159):

> "So if property belonging to the government, upon which claims exist, is sold upon judicial decree, and the proceeds are paid into the registry, the court would have jurisdiction to direct the claims to be satisfied out of them. Such decree of sale could only be made upon application of the government, and by its appearance in court, as we have already said, it waives its exemption and submits to the application of the same principles by which justice is administered between private suitors.
>
> "Now, it is a settled principle of admiralty law, that all maritime claims upon the vessel extend equally to the proceeds arising from its sale, and are to be satisfied out of them. Assuming, therefore, that the Siren was in fault, and that by the tort she committed a claim was created against her, we do not perceive any just ground for refusing

> its satisfaction out of the proceeds of her sale. The government is the actor in the suit for her condemnation. It asks for her sale, and the proceeds coming into the registry of the court, come affected with all the claims which existed upon the vessel created subsequent to her capture. There is no authority, that we are aware of, which would exempt them under these circumstances, because of the exemption of the government from a direct proceeding *in rem* against the vessel whilst in its custody."

In the case at bar, just as in *The Siren supra,* it was the United States that moved for and obtained the order directing the sale of the *res* (R. 13a, 14a-15a, 16a-18a). And it was the United States that moved for and obtained the order confirming the sale and directing the deposit of the proceeds in the registry of the court (R. 42a, 44a).

Also in *The Nuestra Señora de Regla supra,* the jurisdiction of the District Court to enter a decree against the United States for damages up to the value of the *res* was, over the contention of that party to the contrary, sustained. This Court, in so ruling, said (101):

> "The United States were * * * in legal effect the captors, and they came voluntarily into court to secure for themselves the benefit of what had been done. They deliberately adopted the acts of the military and naval officers as their own, and came, as captors, to condemn their prize."

And, continuing, this Court said (102):

> "It is objected, however, that the executive department of the government had no power, in the absence of express legislative authority, to make such a submission. It was the duty of the United States * * * to bring all captured vessels into

> a prize court for adjudication * * *. The executive department had the right to bring the suit. In that suit it had been determined that the capture was unlawful. Necessarily, therefore, the question of damages to the owner of the captured vessel arose."

But, urged the Custodian below in the case at bar, the District Court was without power to enforce against the United States the execution of any decree for damages that it might enter thereagainst. He contended (Custodian's Brief below, p. 9) "that this Court" (Circuit Court of Appeals) "is now unable to give effect to any decision favorable to the appellant" (petitioner). And, therefore, he argued that the Court of Appeals was without jurisdiction to enter a decree against the United States.

The want of merit underlying that argument appears not only from what was *done* in *The Siren, supra,* and *The Nuestra Señora de Regla, supra,* but also from what was *said* in the latter of those two cases, where this Court declared (103):

> "We see no reason why this might not be done in such a case. *It is true any judgment that may be rendered cannot be judicially enforced, but the questions to be settled are judicial in their character, and are incidents to the suit which the United States were required to bring to enforce their rights as captors.* * * * When, therefore, the United States, through the executive of the nation, waived their right to exemption from suit, and asked the prize court to complete the adjudication of a cause which was rightfully begun in that jurisdiction, *we think the government is bound by the submission, and that it is the duty of the court to proceed to the final determination of all questions legitimately involved*" (Emphasis supplied.)

And the same rule has been applied in numerous other cases over the same adverse contention of the United States; notably so in the case of *The Thekla,* 266 U. S. 328. This Court there sustained a decree affirmatively awarding damages against the United States on a counter-claim in a collision case instituted by the Government. In so ruling, this Court there said (340):

> "When the United States comes into court to assert a claim it so far takes the position of a private suitor as to agree by implication that justice may be done with regard to the subject matter. The absence of legal liability in a case where but for its sovereignty it would be liable does not destroy the justice of the claim against it. When the question concerns what would be paramount claims against a vessel libelled by the United States were the vessel in other hands, the moral right of the claimant is recognized. *The Western Maid,* 257 U. S. 419, 433, 434. *The Siren,* 7 Wall. 152. *The Athol,* 1 Wm. Rob. 374, 382. . . . The libel in such a case is like a bill for an account, which imports an offer to pay the balance if it should turn out against the party bringing the bill. *Columbian Government* v. *Rothschild,* 1 Sim. 94, 103. *Goldthwaite* v. *Day,* 149 Mass. 185, 187."

Further pointing out that the Government's joining in the suit carried with it the acceptance of liability as the same might be determined by the Court, this Court continued (341):

> "As has been said in other cases the question of damages to the colliding vessel necessarily arose and it is reasonable for the Court to proceed to the determination of all the questions legitimately involved, *even when it results in a judgment for damages against the United States. The Nuestra Señora*

> *de Regla,* 108 U. S. 92. *The Paquete Habana,* 198 U. S. 453, 465, 466. We gather that our conclusion accords with the opinion of the English Courts. *The Newbattle,* 10 P. D. 33. *The Tervaete,* [1922] pp. 259, 272. *It is said that there is no statute by which the Government accepted this liability. It joined in the suit, and that carried with it the acceptance of whatever liability the courts may decide to be reasonably incident to that act''* (Emphasis added).

Secondly, as to the equity jurisdiction: The same rule as that which makes the admiralty jurisdiction exercisable against the sovereign submitting thereto must, in reason, make him liable under the same circumstances to the exercise of the equity jurisdiction (*Osborn* v. *United States Bank,* 9 Wheat. 738, 838-839, 842-844.)

The sovereign's agent, who exceeds his lawful authority, may not shield himself from subjection to the equity jurisdiction behind a plea of sovereign immunity, whether the sovereign be state (*Id.*; *In re Ayers,* 123 U. S. 443, 507; *Ex parte Young,* 209 U. S. 123, 159) or national (*The Flying Fish,* 2 Cranch 170, 178-179; *United States* v. *Lee,* 106 U. S. 196, 220-221; *Philadelphia Co.* v. *Stimson,* 223 U. S. 605, 619-620).

The Custodian's receipt of the trust fund in the case at bar having been unlawful, it follows then, that even though he had not been a party participating in the cause, he could have been made such against his will and forced by decree to restore the value of the *res* to court or pay it to petitioner to the extent the latter was entitled thereto. But the Custodian was already a willing party to the cause. Hence, his amenability to the Court's equity jurisdiction is all the clearer.

Even then, if his principal, the sovereign, had not been a party to the cause, the lower Courts' equity jurisdiction would still have had within it the respondent Crowley against whom its decrees might be entered and enforced to execution.

But, in addition, the sovereign United States, his principal, was a party voluntarily promoting and participating in the litigation not only in the person of its Custodian but as libellant, in which latter capacity it had caused the sale of the "Brennero's" cargo to be made and its proceeds to be deposited in the District Court's registry. Hence, under the principles discussed *supra* (60-67), at least insofar as it may have received the trust fund from its Custodian, it could not be heard to urge a want of jurisdiction in either that or the Circuit Court to adjudicate, and decree payment of, its liability in respect to that *res*.

d

The stay of a supersedeas was unnecessary to keep alive the District Court's jurisdiction.

The purpose of a supersedeas is of course to stay a Court's officials by law from executing its decree. But, in the case at bar, the District Judge and Clerk had already been stayed by two laws and respected neither.

They were stayed by Federal law (R. S. secs. 1007, 1012, *supra*, 7n.) from executing the Court's decree until Tuesday, February 1, 1944 (R. 7a); they joined (41st U. S. Adm. Rule *supra*, 7n.) in executing it on Monday, January 24, 1944, (R. 7a), while that stay still had *seven* days to run.

They were stayed by the rules of their own Court (Dist. Ct's. 28th Adm. Rule *supra*, 8n.), which were authorized by section 918 of the Revised Statutes (28 U. S. C. A.

sec. 731)* and by the 44th United States Admiralty Rule† insofar as they did not trench upon any law or Admiralty Rule of the United States (*Heckers* v. *Fowler,* 2 Wall. 123, 128); and which, for the District Judge and Clerk, had the force of federal law (*Irrigation Company* v. *Gildersleeve,* 174 U. S. 603, 608; *Weil* v. *Neary,* 278 U. S. 160, 169-170).

The said Rule of the District Court was not inconsistent with any United States law or Admiralty Rule. By it the District Judge and Clerk were stayed from executing their Court's decree in the case at bar until a time ten days from and after the day of service, upon the opposite proctor, of a copy of the decree with notice of filing. That service has never yet been made; and the stay, therefore, still remains in full force and effect.

It seems clear that it was the intent of Congress, in adopting the Federal law *supra* (R. S. secs. 1007, 1012), that the stay thereby provided should, for jurisdictional purposes if no other, continue in full force and effect until any appealable decree in a Federal Court should have remained *unexecuted* for ten days, excluding Sundays; and that, if in violation of that law the decree should be executed at an earlier time, the stay should continue to run until the *status quo* had been restored

---

* This statute reads:

"The district courts may, from time to time, and in any manner not inconsistent with any law of the United States, or with any rule prescribed by the Supreme Court under section 730 of this title, make rules and orders directing the returning of writs and processes, the filing of pleadings, the taking of rules, the entering and making up of judgments by default, and other matters in vacation, and otherwise regulate their own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings."

† This Rule reads:

"In suits in admiralty in all cases not provided for by these rules or by statute, the District Courts are to regulate their practice in such a manner as they deem most expedient for the due administration of justice, provided the same are not inconsistent with these rules."

and sufficient time had elapsed *thereafter* as, added to the time intervening between the decree's entry and its execution, would comprise ten days.

Such an interpretation of the law seems reasonable in view of the following considerations.

(1) In a case such as the one at bar, involving money in the Courts' registry, its presence might conceivably be a material factor in enabling an intending appellant to procure a supersedeas bond, whereas its absence in the coffers of government might suggest such difficulties in the way of recovery as to discourage any prospective bondsman.

(2) Again, while the decree remains prematurely executed in violation of law, there is nothing upon which a supersedeas might operate; until the *status quo* is restored there is nothing to be stayed, and to require its filing in the meantime would require the doing of a perfectly vain and inutile act.

(3) The person for whose protection the supersedeas is required has no need of it while he has everything the decree awarded him; and besides, in receiving it unlawfully, was an active participant in the wrong inflicted upon the other party.

And (4) such an interpretation corresponds with that prevailing in the case of statutes of limitation. Such are kindred statutes in that they stay prescription for a specified period of time. And, in their case, when absence from the jurisdiction or other disabling circumstance or condition intervenes to render the statutes inoperative, the period of such disability does not of course count in the computation of the statutory period. No more should it do so in the case of a statute such as we have here.

Below the Custodian pointed to *The Rio Grande supra,* as authority for the proposition that, despite the premature delivery of the *res* in violation of the law, the duty still devolved upon the appealing party, if he would save the jurisdiction, to file his supersedeas just the same; to go through the formality of obtaining a stay when there was nothing left to be stayed; to lock the door of the registry after its treasure had been carried away.

As we read *The Rio Grande supra,* it does not so rule. It is true that the appellant there did file his supersedeas *after* the *res* had been unlawfully removed; though it does not appear that he knew it was gone at that time. But the mere fact that he thus did advisedly or unadvisedly file his bond, when there was nothing left to be bonded, did not, it seems clear, constitute one of the premises, basic or otherwise, upon which this Court there built its conclusion. This Court, in declaring the rule it there enforced, said (465):

> "We hold the rule to be that a valid seizure and actual custody of the *res* by the marshal gives jurisdiction of the subject-matter, and that an accidental or fraudulent or improper removal of it from his custody * * * does not destroy jurisdiction. In the present case the order for restoration was in direct violation of the statute regarding appeals, and did not operate to destroy the jurisdiction of the Circuit Court. That court was authorized to proceed as if no such order had been made."

There is nothing in that or other language of this Court's opinion to suggest that the filing of the supersedeas to stay what had already been done had been effective or requisite in any way to preserve the jurisdiction.

However, were the law to be construed otherwise, such construction could not serve to validate the decree of the

Court of Appeals here complained of. This, for two reasons, viz.: First, the District Court was, in respect to the cargo proceeds, exercising as pointed out *supra* (57-60), an equity *in personam* jurisdiction, whose survival did not depend upon continued retention of the *res;* hence, it was entirely permissible for petitioner, in taking his appeal, to let the *res* go and rely upon the *in personam* jurisdiction of the District and Circuit Courts over the parties to the cause and the ability of the former by means of that control to effect precisely the same result as that attainable with the *res* still in their custody.

Secondly, the proceeds and the question of their ownership were but incidents of the main *res* and cause, viz., the vessel and the question of her ownership. Over this principal *res* and cause, the Circuit Court insisted it still had jurisdiction. If so, it must have had no less over the incidental *res* and cause (*United States* v. *Ames supra; The Three Friends supra*).

Moreover, according to the Court of Appeals, the principal *res*, the vessel, together with just compensation in the way of charter-hire and replacement value, was still in the Court's custody and control; and, the Court further held, was altogether the property of the party or parties that had wrongfully deprived the District Court and petitioner of the incidental *res*. As a court of equity and conscience, it was, therefore, incumbent on it to hold petitioner's lien to have been transferred—by reason of the wrongful removal of the incidental—to the principal, to hold it fully enforceable thereagainst, and to hold it thus still to have been within its own jurisdiction (*Finley* v. *Lynn*, 6 Cranch 238, 252; *The Adeline*, 9 Cranch 248, 284; *Du Pont de Nemours & Co.* v. *Vance*, 19 How. 162, 173; *The Gazelle and Cargo*, 128 U. S. 474, 487; *Liverpool Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, 447).

CONCLUSION

The petition for a writ of certiorari should be granted to the end that the proceedings had below may here be reviewed and the decree there entered reversed.

Respectfully submitted,

HOMER L. LOOMIS,
Pro se.

FILED
JUN 6 1946
CHARLES ELMORE CROPLEY

NO. 1223

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

HOMER L. LOOMIS,

Petitioner,

v.

JAMES E. MARKHAM, ALIEN PROPERTY CUSTODIAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE ALIEN PROPERTY CUSTODIAN IN OPPOSITION

Page

Opinions Below 1
Jurisdiction 1
Question Presented 1
Statutes and Rules Involved 2
Statement 2
Argument 4
Conclusion 6
Appendix 7

CITATIONS

Cases:

Bobyshall v. Oppenheimer, 4 Wash. C. C. 381, Fed. Cas. No. 1591. . 4

Brown v. Evans, 18 Fed. 56 4

Canal Steel Works v. One Drag Line Dredge, 48 F. 2d. 212 5

Central Trust Co. v. Garvan, 254 U. S. 554 5

Colonna, Ex Parte, 314 U.S. 510 2

Cummings v. Hardee, 102 F. 2d 662, certiorari denied, 307 U.S. 637 5

Denny, The, 127 F. 2d 404 5

Francesco Felix, The, 25 Fed. 669 5

Isenberg v. Trent Trust Co., 26 F. 2d 609, certiorari denied, 279 U.S. 862 6

Kotkas, The, 135 F. 2d 917 5

Kutroff v. Sutherland, 66 F. 2d 500 5

Osborn v. United States, 91 U.S. 474 4

Rio Grande, The, 23 Wall. 458 4

Stoehr v. Wallace, 255 U.S. 239 5

Statutes:

Trading with the Enemy Act, 40 Stat. 411, as amended, 50 U.S.C. App. Supp IV 1-31

Sec. 5(b) 3

Sec. 7(c) 3-7

Sec. 9(a) 7

Sec. 9(f) 8

Miscellaneous:

Executive Order No. 9193, July 6, 1942, 7 F.R. 5205 3

Rule 73(d), F.R. Civ. P. 8

Rule 15, Rules of the Circuit Court of Appeals, Third Circuit. . . 9

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

NO. 1223

HOMER L. LOOMIS,
Petitioner,

v.

JAMES E. MARKHAM, ALIEN PROPERTY CUSTODIAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE ALIEN PROPERTY CUSTODIAN IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (R. 90a) is reported at 53 F. Supp. 441. The opinion of the circuit court of appeals (R. 125) is reported at 153 F. (2d) 138.

JURISDICTION

The judgment of the circuit Court of appeals was entered December 21, 1945 (R. 138). A petition for rehearing (R. 147) was denied on February 13, 1946 (R. 178). The petition for a writ of certiorari was filed on May 13, 1946. The jurisdiction of the Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether, in an action to impress a proctor's lien upon the proceeds of a res in the registry of the district court, jurisdiction over the cause terminated when, pursuant to an order of the district court adverse to the proctor's asserted lien and in the absence of a timely motion for a stay, the

fund was paid out to the Alien Property Custodian in whom title to the fund had theretofore been vested.

STATUTES AND RULES INVOLVED

The statutes and court rules involved are set out in the Appendix, infra, pp. 7-9.

STATEMENT

This is an admiralty proceeding involving the cargo of the Italian vessel Brennero. The vessel itself is the subject of a forfeiture proceeding now pending on petition for certiorari (No. 1176, this Term) which is substantially identical with the forfeiture proceeding with respect to the vessel Antoinetta, also pending on petition for certiorari (No. 1172, this Term). The details of the proceedings against the vessels are set forth in the Brief in Opposition filed by the respondents in No. 1172.

When, pursuant to the libel (R. 10a), the Brennero was attached and brought into the custody of the district court, there was found stowed in her holds a cargo of lubricating oil, forfeiture of which was not sought by the libel. Because storage of the cargo was not feasible, the United States moved that it be sold (R. 13a) and the Court so ordered (R. 16a). The petitioner herein (hereafter called the proctor) thereupon took various steps on behalf of the Royal Italian Ambassador, one of the claimants, including the filing of petitions for mandamus and prohibition in this Court (see Ex Parte Colonna, 314 U.S. 510), in opposition to the sale. These failing, the sale was confirmed and the net proceeds, amounting to $151,599.45, were deposited in the registry of the court (R. 42a).

On May 11, 1942, while the motion for confirmation of the sale was pending, the proctor filed a petition for the determination of the fair and reasonable value of his legal services to the cargo and for payment from the proceeds of the sale (R. 34a). He alleged that he had relied upon the cargo as the source of compensation not only because it was in the custody of the Court, but also because "by agreement between him and the owner of said cargo it was stipulated that his services and disbursements should be chargeable as a lien thereon and should be recoverable therefrom" (R. 35a).

On July 22, 1942, the Alien Property Custodian issued Vesting Order No. 52 (R. 52a) under the authority of the Trading with the Enemy Act, as amended, and particularly Sections 7(c) and 5(b) thereof, and Executive Order No. 9193 of July 6, 1942. 40 Stat. 411, as amended, 50 U.S.C. App. §§ 1-31; 7 F.R. 5205. The order demands and seizes, and declares vested in the Custodian forthwith, all right, title and interest, if any, of the Royal Italian Government, the Italian Navy, and Societa Anonima Cooperativa di Navigazione Garibaldi, in the vessel Brennero. The term vessel was defined to include "also the proceeds of the cargo that was on board" the Brennero at the time of the libel for forfeiture (R. 53a). On March 17, 1943, the Custodian filed a petition based on the Vesting Order alleging that he was entitled to the proceeds of the sale of the cargo, praying that they be paid to him (R. 47a), and expressly denying that the proctor was entitled to a lien on the cargo (R. 49a).

Seven days later, the proctor filed a second petition for allowances. In this petition he prayed for payment to him of the entire $151,599.45 in the registry "on account" of the amount due him for legal services, not merely as proctor for the cargo, but as proctor for the vessel herself and for three other vessels in forfeiture proceedings in the District of New Jersey (see Nos. 1176-1179, this Term) and as attorney for nearly one hundred persons indicted under the Espionage Act of 1917 for sabotage of the said four vessels and four other vessels outside the District (R. 66a).

The proctor alleged that he was retained to perform these services by the Royal Italian Government, on its own behalf and on behalf of the other ship owners involved, and that in his acceptance of the retainer "it was particularly understood and agreed" that the cargo of lubricating oil on the Brennero should be chargeable with a lien for any and all compensation that he might earn in litigation affecting these ships, their cargoes and their officers and crews (R. 67a-68a).[1/]

1/ No details were furnished in either petition for allowances as to the circumstances or the date of the agreements, or the names of the individuals who had concluded them with the proctor.

The district court held that under the Vesting Order the Custodian had acquired absolute title to the fund in the registry and that since the proctor's claim was in substance a suit against the United States, his exclusive remedy was a suit under Section 9(a) of the Trading with the Enemy Act, as amended (R. 90a, 93a). Accordingly, by an order filed January 20, 1944, the court directed the clerk to pay the fund to the Custodian, without prejudice to the rights of the proctor to move against the Custodian (R. 94a). No provision for a stay was made in the decree. Four days later, in the absence of any motion by the proctor for a stay, the clerk of the court forwarded a check for $151,599.45 to the Alien Property Custodian, whose receipt was filed on January 29, 1944 (R. 7a). No further action was taken by the proctor until April 20, 1944, on which date he appealed (R. 95a-102a).

The court below affirmed holding that jurisdiction had ended when, in the absence of a motion for a stay by the proctor, the funds were paid to the Custodian pursuant to court order (R. 125, 132, 138).

ARGUMENT

1. The decision below was correct. Payment was made, as the Circuit Court of Appeals pointed out, pursuant to a lawful order.[2/] Following that order, ten days—indeed, almost three months—passed and the petitioner did nothing. He neither urged the district court to recall the payment (Osborn v. United States, 91 U.S. 471; Bobyshall v. Oppenheimer, 4 Wash. C.C. 388, Fed. Cas. No. 1591, (C.C.E.D. Pa.)) nor did he file a supersedeas bond.[3/] (The Rio Grande, 23 Wall. 458, 461; Brown v. Evans, 18 Fed. 56, 61 (C.C.D. Nev.)). On the last day of the statutory three months period, the petitioner perfected his appeal (R. 95a). In such circumstances the petitioner must be

---

2/ We pass the question of whether the payment, which was made before the tenth day following the entry of the order directing payment, was premature under R.S. § 1107. ". . . where a writ of error may be a supersedeas, execution shall not issue until the expiration of ten days." R.S. § 1007 as amended. This section was made applicable to appeals by § 2 of the Act of January 31, 1928, 45 Stat. 54 as amended by the Act of April 26, 1928, 45 Stat. 466, 28 U.S.C. § 861b.

3/ See Rule 73(d) F.R. Civ. P., made applicable to this proceeding by Rule 15 of the Rules of the Circuit Court of Appeals for the Third Circuit. Appendix, infra, p. 8.

deemed to have acquiesced in the payment and to have consented to whatever consequences followed. Cf. The Francesco Feliz, 25 Fed. 669 (E. D. N.Y.).

The consequence of the payment was, as the court below held, a loss of the res which was the subject matter of the suit; this loss ended jurisdiction of the case and of the appeal. Canal Steel Works v. One Drag Line Dredge, 48 F. 2d 212 (C.C.A. 5); The Denny, 127 F. 2d 404 (C.C.A. 3); The Kotkas, 135 F. 2d 917 (C.C.A. 5). Moreover, once the payment was received by the Custodian, the only appropriate method for recovery thereof was by suit under Section 9(a) of the Trading with the Enemy Act (Appendix, infra, p. 7), which provides, in pertinent part, that:

> "Any person not an enemy or ally of enemy claiming any interest, right or title in any money . . . which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States . . . may institute a suit in equity . . . (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled."

Under the terms of Section 7(c) of the Act, this is the "sole relief and remedy" available to a person seeking the aid of a court to obtain return of vested property (Appendix, infra, p. 7). To the same effect is Section 9(f), which provides that money paid over to the Custodian shall not be subject to any order or decree of any court except as provided by Section 9 (Appendix, infra, 7). See Central Trust Co. v. Garvan, 254 U.S. 554; Stoehr v. Wallace, 255 U.S. 239; Cummings v. Hardee, 102 F. (2d) 622, (App. D.C.), certiorari denied, 307 U.S. 637. Furthermore, money received by the Custodian is, in accordance with Section 12 of the Act, deposited in the Treasury. This is therefore a case in which Section 9(a) requires that the Treasurer be joined as a party defendant. See Kutroff v. Sutherland, 66 F. (2d) 500 (C.C.A.2). Only by bringing a suit under Section 9(a) will the petitioner be able to meet this requirement.

2. Despite the prolixity of the petition, the foregoing question—whether the circuit court of appeals correctly held that the funds involved had passed from the jurisdiction of the district court, leaving the petitioner only with a right to sue the Custodian to assert his lien—is the only issue remaining in the case.[4] That question is clearly not of sufficient general importance to warrant review by this Court. We believe that, for the reasons stated, the decision below was correct. But, even in the event of reversal, the petitioner would have no more than he already has under the decision and under the Trading with the Enemy Act, as amended—an opportunity to litigate the validity of his alleged lien on the proceeds of the cargo. The conclusion of the court below that such a proceeding must take place in a Section 9(a) suit will preserve the effectiveness of the statutory conditions for the return of monies received by the Custodian under the Act.

CONCLUSION

The decision below is correct and there exists no conflict. We respectfully submit that the petition for a writ of certiorari should be denied.

J. HOWARD McGRATH,
Solicitor General.

JOHN F. SONNETT,
Assistant Attorney General.

PAUL A. SWEENEY,
DAVID SCHWARTZ,
DAVID E. FELLER,
Attorneys.

RAOUL BERGER,
General Counsel to the Alien Property Custodian,
Of Counsel.

JUNE, 1946

---

[4] The other questions raised relate to the rights of the enemy claimants to the cargo (Questions 1, 3, Pet. 10) and to the decision of the District Court on the merits (Questions 2, 4, Pet. 10, 11). The enemy claimants have not appealed and the decision of the District Court on the merits is no longer in the case under the ruling of the Circuit Court of Appeals that jurisdiction has ended. The asserted conflict with Isenberg v. Trent Trust Co., 26 F. (2d) 609, 613 (C.C.A. 9), certiorari denied, 279 U.S. 862 (Pet. 26) relates to the decision of the District Court on the merits.

Statutes

Trading with the Enemy Act, c. 106, 40 Stat. 411, as amended (50 U.S.C. App. 1-31):

Sec. 7(c) [as amended, 40 Stat. 1020]

* * * * * *

The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him shall be that provided, by the terms of this Act, and in the event of sale or other disposition of such property by the Alien Property Custodian, shall be limited to and enforced against the net proceeds received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States.

* * * * * *

Sec. 9(a):

That any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: Provided, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the

Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated.

* * * * * *

Sec. 9(f):

Except as herein provided, the money or other property conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian, shall not be liable to lien, attachment, garnishment, trustee process, or execution, or subject to any order or decree of any court.

RULES

1. Rule 73, Federal Rules of Civil Procedure:

(d) Supersedeas bond.

Whenever an appellant entitled thereto desires to stay on appeal, he may present to the court for its approval a supersedeas bond which shall have such surety or sureties as the court requires. The bond shall be conditioned for the satisfaction of the judgment in full together with costs, interest, and damages for delay, of for any reason the appeal is dismissed or if the judgment is affirmed, and to satisfy in full such modification of the judgment and such costs, interest, and damages as the appellate court may adjudge and award. When the judgment is for the recovery of money not otherwise secured, the amount of the bond shall be fixed at such sum as will cover the whole amount of the judgment remaining unsatisfied, costs on the appeal, interest, and damages for delay, unless the court after notice and hearing and for good cause shown fixes a different amount or orders security other than the bond. When the judgment determines the disposition of the property in controversy as in real actions, replevin, and actions to foreclose mortgages or when such property is in the custody of the marshal or when the proceeds of such property or a bond for its value is in the custody or control of the court, the amount of the supersedeas bond shall be fixed at such sum only as will secure the amount recovered for the use and detention of the property, the costs of the action, costs on appeal, interest, and damages for delay.

* * * * * *

2. Rule 15, Rules of the United States Circuit Court of Appeals for the Third Circuit:

Rule 15.—Bonds on appeal and supersedeas bonds.

1. Federal Rules of Civil Procedure Applicable. The procedure governing bonds for costs on appeal and supersedeas bonds is prescribed by subdivisions (c), (d), (e) and (f) of Rule 73 of the Federal Rules of Civil Procedure, which are adopted as rules of this court governing bonds for costs on appeal from district courts (including the District Court of the Virgin Islands) in all cases, and bonds for supersedeas in appeals from district courts (including the District Court of the Virginia Islands) in civil actions, including copyright cases and in bankruptcy proceedings and admiralty cases.